AMERICAN BAR ASSOCIATION
# JOVRNAL

NOVEMBER 1939

VOL. XXV NO. 11

*Old City Hall, Saratoga Springs, New York,*

*Where Association Was Organized*

**The Achievements of the American Bar Association: A Sixty Year Record, Begins in This Issue—Administrative Agencies as Legislators and Judges—A Formula for Finding the Law—Other Articles and Departments.**

# Legal Institutes on the New Rules of Civil Procedure

Two volumes of the proceedings of legal institutes on the subject of the Rules of Civil Procedure for the District Courts of the United States are now available. The Cleveland proceedings contain the rules themselves, the notes of the Advisory Committee, illustrative forms, tables of cross references, bibliography, and comprehensive index. The proceedings of the Washington and the New York Institutes, in one volume, with elimination of material appearing in the Cleveland proceedings, are now available.

These two books published by the American Bar Association contain full discussion of the rules by members of the Advisory Committee which drafted them and by other eminent lawyers, law teachers and jurists. The speakers at these Institutes disclaim any authority to interpret the Rules, but the discussions are illuminative and the answers to questions propounded at the meetings show how most difficulties are removed by reference to applicable rules. The Attorney General of the United States ordered 1,500 copies of each volume and supplied a copy to every federal judge and to the members of the legal staff of the Department of Justice.

## SPEAKERS

### At the Cleveland Institute

Members of the Advisory Committee:

William D. Mitchell of New York, Chairman
Edgar B Tolman of Chicago, Secretary
Dean Charles E. Clark of New Haven, Conn., Reporter
Robert G. Dodge of Boston
Prof. Edson R. Sunderland of Ann Arbor, Michigan
Judge George Donworth of Seattle

### At the Washington Institute

Members of the Advisory Committee and Other Speakers:

Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Hon. Homer S. Cummings, then Attorney General of the United States
Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia
Hon. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia
Hon. Oscar R. Luhring, Justice, District Court of the United States for the District of Columbia
Hon. W. Calvin Chesnut, Judge of the United States District Court for the District of Maryland
Prof. William W. Dawson of Western Reserve University Law School

### At the New York Institute

Members of the Advisory Committee:

William D. Mitchell
Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Prof. Edson R. Sunderland
Robert G. Dodge

**Orders are now being taken by the American Bar Association.**

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**AMERICAN BAR ASSOCIATION**
**1140 North Dearborn, Chicago, Illinois**

**Please send me immediately; postage prepaid: a copy of the Proceedings of the Cleveland Institute on the Federal Rules, for which I am enclosing (money order) (check) for $3.00** ☐ **check here**

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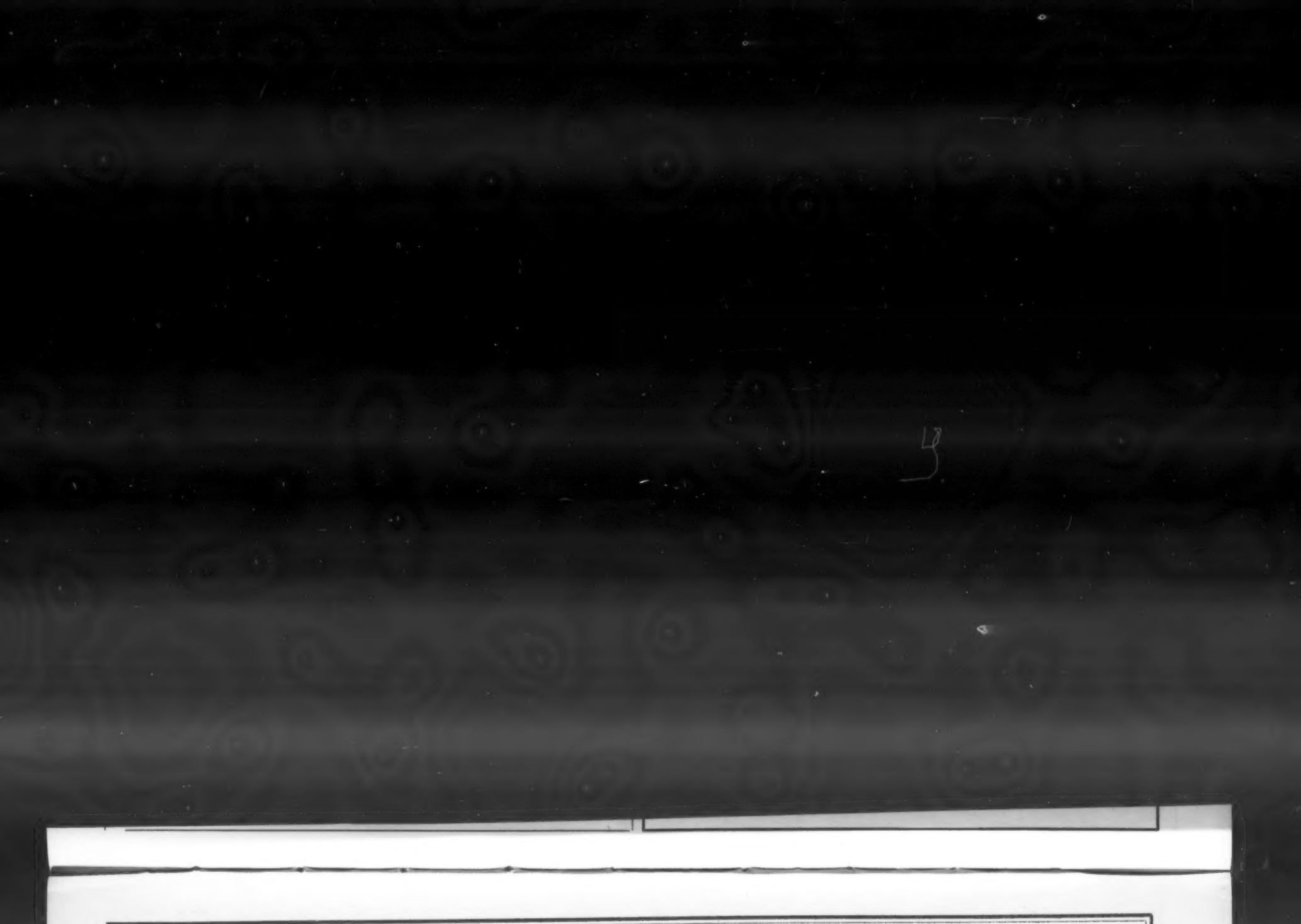

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# CURRENT EVENTS

## *Conference of Section Chairmen Discusses Improvement and Simplification of Annual Meeting Program—Administrative Matters Considered*

IMPROVEMENT and simplification of the program for the annual meeting of the Association were the principal subjects of discussion at a conference of the Section Chairmen held in Chicago on October 21 and 22 at which several members of the Board of Governors were also present. Those in attendance included President Beardsley; Thomas B. Gay, Chairman of the House of Delegates; Secretary Harry S. Knight; Treasurer John H. Voorhees; Assistant Secretary Joseph D. Stecher; Edgar B. Tolman; David A. Simmons; Joseph W. Henderson; Carl V. Essery; Philip J. Wickser of the Board of Governors and the following Section Chairmen: Raymer F. Maguire, Bar Organization Activities; Jacob M. Lashly, Commercial Law; James J. Robinson, Criminal Law; John W. Cronin, Insurance Law; William Roy Vallance, International and Comparative Law; Paul F. Hannah, Junior Bar Conference; Charles E. Dunbar, Jr., Legal Education and Admissions to the Bar; Robert E. Hardwicke, Mineral Law; Arnold Frye, (Secretary) Municipal Law; Delos G. Haynes, Patent, Trademark and Copyright Law; Walter S. Fenton, Public Utility Law; George E. Beers, Real Property, Probate and Trust Law, and George M. Morris, Taxation.

In calling the meeting, President Beardsley suggested the desirability of making some substantial departures from the conventional pattern for annual meeting programs to the end that they may be made more attractive to the membership. He pointed out that the great number of separate meetings being held at the same time creates confusion and difficulty of choice among the members attending the Convention; that it appeared to be desirable to reduce the number of meetings to permit more general attendance and that thought should be given to providing Assembly programs of general interest to all.

A spirited discussion was precipitated by the suggestion that one possibility of remedying the situation might be the elimination of some of the separate Section sessions and the substitution therefor of general meetings under the joint auspices of several Sections. While all the Chairmen expressed a desire to cooperate with the President in attaining his objectives, there was considerable difference of opinion as to the feasibility of the proposal to dispense with individual Section meetings. Attention was directed to the keen interest being manifested in the several Sections and to the opportunity which smaller meetings afford for free discussion and more intimate acquaintance.

As the discussion proceeded, it became apparent that the Sections quite naturally fall within two separate groupings or classifications and that the problems of each group are somewhat different. Without attempting to record all of the unique and varied designations which the members of one group gave to the other, it would appear that one group might be described as those devoted to specialized studies of different subjects of substantive law, while the other consists of those devoted to the public activities of the Bar. To the former belong the Sections of Commercial Law, Insurance Law, International and Comparative Law, Mineral Law, Municipal Law, Patent, Trademark and Copyright Law, Public Utility Law, Real Property, Probate and Trust Law and Taxation, while in the latter class fall Bar Organization Activities, Criminal Law, Judicial Administration, Junior Bar Conference and Legal Education and Admissions to the Bar.

There was general agreement that both types of Sections are essential and that there should be no competition between them. It was pointed out, however, that such competition exists by reason of the fact that sessions of the Sections belonging to both groups are held at the same time. Many of those in one group desire to attend the sessions of the other group but are unable to do so. The result is that, so far as the annual meetings are concerned, each to some extent hampers the other. Although it was recognized that the elimination of all such conflicts in a five day convention is perhaps impossible of accomplishment, the hope was expressed that eventually the program may be so arranged that one-half day be set aside exclusively for the sessions of the specialty sections and another half day set aside exclusively for the sessions of the public activity sections.

With respect to the suggestion that some sessions might be eliminated by the grouping of several Sections in a single meeting, the opinion was expressed that such a plan would not be feasible for the so-called specialty Sections. The diverse subjects considered, some highly technical in nature, render it difficult to find a subject of substantive law of common interest to all. It was generally conceded, however, that this situation did not obtain with the public activity sections and that their general objectives, designed to be of service to the public, are and should be of interest to all members of the Bar. Accordingly it was proposed and agreed to by those in attendance that at the next annual meeting of the Association the program for one session of the Assembly will be under the joint auspices of the public activity sections.

Following discussion of questions relating to program, attention was given to matters of adminstration, both within the Sections and the Association generally. One subject to which further study is to be given is the development of a plan for the selection of Section officers, councils and committees whereby the lag which now follows the annual meeting may be avoided. The task of appointing a great many committee members and obtaining acceptances requires considerable time and unless the Section chairman is forewarned of his election or unless the old officers and committees continue to function for a definite period following the annual meeting, there is an interval of several months during which Section work is at a standstill.

Another matter which has been discussed at previous conferences is the consideration of Section reports by the

House of Delegates. Here again is a practical problem not easy of solution. If the Section report is not adopted and ready for presentation to the House well in advance of its final session, it may not be possible to obtain for it proper consideration upon a usually crowded calendar. It was suggested that perhaps a midwinter meeting of the House, of which the third such meeting will be held in Chicago in January, may become an annual necessity for the consideration of Section reports except those of an emergency nature requiring prompt consideration at the annual meeting.

In connection with the general discussion of membership work, it was proposed that the Sections coordinate in providing capable speakers for local and regional Bar Association meetings. It was felt that not only would such a plan render much appreciated assistance to the local Bar Associations but it would also promote interest in the American Bar Association.

There was unanimity of opinion that the conference was most helpful to the Sections in apprising them of their mutual problems and promoting closer cooperation between them. The subjects discussed and suggestions made should receive the considered attention of all members. It is hoped that those who may have ideas upon the problems considered will communicate them to the officers of their Sections or to the officers of the Association.

JOSEPH D. STECHER,
Assistant Secretary.

## *Distinguished Speakers on Administrative Law Institute Program*

THE American Bar Association's Institute on Administrative Law to be held in Washington during the week of November 13 will be featured by the number of outstanding speakers who will take part in the sessions. Justice Harlan F. Stone of the Supreme Court of the United States will participate in the first day's session, which will be inaugurated by Chief Justice D. Lawrence Groner of the United States Court of Appeals. The program for the rest of the opening session and of the succeeding sessions will be as follows:

NATIONAL LABOR RELATIONS BOARD

*Monday, November* 13, 4:00-6:30 *P.M.*

Speakers: J. Warren Madden and T. Justin Moore of Richmond.

Panel: Judge Joseph A. Padway, American Federation of Labor; Lee Pressman, C. I. O.; Judge William Ransom, Former President of American Bar Association.

INTERNAL REVENUE BUREAU

*Tuesday, November* 14, 4:00-6:30 *P.M.*

Speakers: Chief Counsel John P. Wenchel and E. Barrett Prettyman, Former Chief Counsel.

Panel: Robert N. Miller, Former General Counsel; Colin F. Stam, Joint Committee on Internal Revenue Taxation of the House of Representatives; and Middleton Beaman, Legislative Counsel of the House of Representatives.

SECURITIES AND EXCHANGE COMMISSION

*Wednesday, November* 15, 4:00-6:30 *P.M.*

Speakers: John J. Burns, of Boston, Former General Counsel; and Thomas A. Reynolds, of Chicago.

Panel: ———

FEDERAL TRADE COMMISSION

*Thursday, November* 16, 4:00-6:30 *P.M.*

Speakers: Chairman Robert E. Freer and Judge J. Harry Covington, of Washington.

Panel: ———

THE RELATION OF INTERSTATE COMMERCE COMMISSION PRACTICE TO OTHER ADMINISTRATIVE PROCEEDINGS

*Friday, November* 17, 4:00-5:15 *P.M.*

Speaker: Clarence A. Miller, of Washington.

Panel: Wilbur LaRoe, President of the Association of Practitioners Before the I. C. C.; and Carl McFarland.

WHAT THE WAGE-AND-HOUR LAW HOLDS FOR THE BAR

*Friday, November* 17, 5:15-6:30 *P.M.*

Speaker: Walter F. Dodd, of Chicago.

Panel: George A. McNulty, General Counsel, Wage-and-Hour Administration; Gerard D. Reilly, Solicitor, Department of Labor; Reuben Oppenheimer, of Baltimore.

*Friday, November* 17, 8:00-9:15 *P.M.*

Appeals of Administrative Agencies, from the Viewpoint of the Court—Justice Justin Miller of the United States Court of Appeals for the District of Columbia.

*Friday, November* 17, 9:15-10:30 *P.M.*

Fundamental Principles of Administrative Procedure—Dean Roscoe Pound, Director of the Institute.

Arrangements are being made with the agencies under discussion so that visiting lawyers will have an opportunity to attend hearings. The subject matter of the Institute will be closely confined to practice and procedure in order to give to the bar the type of information which will be useful to them in their practice. Lawyers who are interested in attending should communicate with the Chairman of the Institute Committee, Mr. George Maurice Morris of Washington, D. C., who was formerly Chairman of the American Bar Association House of Delegates.

The proceedings of the Administrative Law Institute may be published if a sufficient demand for them is evidenced. Those desiring to place an order for the proceedings, which if published will be sold for $2.00, may send their order to Mr. Morris.

## *Supreme Court of Oklahoma in Vigorous Assertion of Inherent Power and Duty Makes Order for Integration of State Bar—Legislative Acts Ignored*

THE Supreme Court of Oklahoma, in an order entered Oct. 10, promulgated rules to create, control, regulate and integrate the Bar of the State. It also held the June Bar examination as heretofore and has named a committee of Bar Examiners to conduct the examination in the future. In so doing it wholly ignored the Act of the Legislature repealing the State Bar Act, and another Act admitting all students of approved law schools to the Bar without requiring an examination.

The Supreme Court's action was taken on an original petition praying that it integrate the Bar. This petition was filed by Mr. Logan Stephenson, President of the late State Bar of Oklahoma; J. H. Gordon, Jr., of McAlister; Don Welch, Speaker of the Oklahoma House, Madill; James D. Fellers, former President of the Oklahoma Junior Bar Conference, Oklahoma City; Frank M. Bailey, former President of the State Bar of Oklahoma, Chickasha; A. Francis Porta, Majority Floor Leader of the Oklahoma House, El Reno; Crawford W. Cameron, Marietta; A. B. Honnold, Tulsa; F. B. H. Spellman, Alva; Clifford W. Cleft and Francis Stewart, of Oklahoma City. After the original petition was filed additional petitions were filed by the Tulsa County Bar Association, the Oklahoma Bar Association and many other local bar associations throughout the State.

The Court's opinion granting the prayer and promulgating the rules integrating the Bar was handed down by Danner, J. and concurred in by Bayless, C. J., Welch, V. C. J. and Riley, Osborn, Corn, Gibson, Hurst and Davis,

JJ. It is a strong assertion of the "inherent power of the court," to determine the qualifications for admission to the Bar, when those qualifications are wanting, and when the privilege of practicing law has been forfeited; also of its power, in the exercise of a sound judicial discretion, to create, control, regulate and integrate the State Bar of Oklahoma.

## *Extension of Service to Members*

THE Board of Governors, acting on the recommendation of its Sub-Committee on Administration, has decided to continue the service heretofore offered members of the Association, in respect to securing copies of opinions of the United States Supreme Court, and to extend it to include other material.

The Supreme Court opinion service enables any member, upon a request addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and accompanied by $1.00 for each opinion desired, to receive a copy thereof by airmail as soon as available from the printer. In cases where the request is received before the opinion is rendered, it usually is available within 24 hours after it is announced. If it is desired that it be sent special delivery, 10c should be added to the remittance. The Supreme Court's docket number, when known, should be given, as well as the name of the case. When these are not known, sufficient description of the case should be given so that it may be readily identified. Checks should be written to the Association and enclosed with the request for the opinion.

The extension of this service consists of arrangements for furnishing to members of the Association other current government documents, publications, and reports, available in Washington, D. C., on a similar basis. Requests should be sent to the Association at the same address, 1152 National Press Building, Washington, D. C., checks being written also to the Association. The service charge for each item requested is $1.00. To this will be added the cost of the document, when not obtainable free, and the cost of mailing; both of which, when known to the member, should be added to the $1.00 for each document and enclosed with the request. Regular mail will be used in this service unless otherwise specified and extra postage added to the remittance. It is not contemplated that formal bills will be rendered for cost of the publications and postage where these amounts are not sent with the request; but the amount due will be noted on a slip of paper enclosed with the material. In order to provide this service at such a nominal cost, it will be necessary to keep down to a minimum the correspondence in connection therewith.

This extension of the opinion service does not supplant and has no relation to that service which the Association provides for its Section officers and Committee members pertaining to their Association work. This latter service is furnished without cost to those entitled to receive it.

## *Operation of Negro Law School in N. C. Postponed*

THE following account from the Durham (N. C.) Morning Herald, of Oct. 4 sets forth the latest development in the North Carolina effort to take action in accordance with the decision of the U. S. Supreme Court in *Missouri ex rel Gaines vs. University of Missouri*, 83, Adv. Op., 207; 59 Sup. Ct. Rep., 2327:

"There will be no law school this year at the North Carolina College for Negroes after all, because only one applicant was able to qualify for the work. Following a consultation of officials yesterday, it was decided to wait until next year to begin that phase of graduate study at the college. In the meantime the lone qualifying student, Logan Delany, has decided to take other graduate studies until next year.

"Law work at N. C. C. N. was to have been introduced this year as part of a general program of graduate work, authorized by the North Carolina Legislature upon the recommendation of a Special Commission and the Governor, and in the light of a recent Supreme Court decision ruling that Negroes must have educational opportunities within their own states comparable to those of white citizens.

"College officials yesterday issued the following statement on postponement of the law school:

" 'For the reason that only one qualified student enrolled, the operation of the law school of the North Carolina College for Negroes in Durham has been postponed until September, 1940, it was announced here today by President James E. Shepard. The school was opened on Monday, September 25, and closed on Saturday, September 30. Decision to postpone the operation of the law school was reached after a number of conferences between members of the faculty, the president, the board of trustees of the college and the governor of the state.

" 'During the intervening months Dean M. T. Van Hecke, of the law school of the University of North Carolina, who served as acting dean of the Negro law school, will continue in an advisory capacity. The law library, collected and organized by Miss Lucile Elliott, law librarian of the University of North Carolina, and housed on the second floor of the library of the North Carolina College for Negroes, will be available to law students and to members of the bench and bar.

" 'The single student who had enrolled in the law school has entered the graduate school of the North Carolina College for Negroes, and will reenter the law school when it reopens next September.

" 'The teaching staff of the law school of the North Carolina College for Negroes was recruited from the law faculties of the University of North Carolina and of Duke University, including Profs. M. S. Breckenridge, John P. Dalzell, Fred B. McCall, Douglas Maggs, D. W. Markham and J. Douglass Poteat. It is expected that this group will constitute the nucleus of the faculty when the law school opens again in September, 1940.' "

## *Notable Tribute to George B. Rose of Little Rock*

THE regular annual June dinner meeting of the Little Rock Bar Association was held on June 13, 1939, at the Little Rock Country Club in conjunction with the Little Rock Junior Bar Association. The meeting was called as a joint meeting of both associations in honor of George B. Rose, now in his sixtieth year of law practice. The program was arranged by a special committee appointed by the President, consisting of Merrick Moore, Chairman, Frank Pace, Jr., and Blake Downie, this committee having been appointed at the recommendation of the regular program committee.

After the dinner, Mr. Parham, as presiding officer, announced the presence of many distinguished guests, including Gov. Carl E. Bailey; members of the Supreme Court, Circuit and Chancery Courts; the Hon. Abe Collins of De Queen, retiring President of the Bar Association of Arkansas; Senator Barney of Texarkana; the Hon. Cooper Land of Hot Springs; and the Hon. Joe Barrett of Jonesboro. The purpose of the meeting was then explained by Mr. Parham and various telegrams received by the Association and Mr. Rose were then read by him, including one from the Hon. Frank Hogan, President of the American Bar Association, and one from its Executive Secretary; one from the Bar Association of Jonesboro; and one from the Arkansas Bar Association of negro lawyers.

After being introduced by Mr. Parham, Federal Judge T. C. Trimble, Jr.,

Associate Justice Frank Smith of the Supreme Court of Arkansas, and the Hon. H. T. Harrison, President of the Bar Association of Arkansas, spoke in eulogy of the guest of honor. Mr. Rose then responded, denying his worthiness of the fulsome praise accorded to him. When Mr. Rose concluded, the chairman held, however, that the charges made had been sustained. Mr. Shields Goodwin then moved that the election of officers ordinarily held at this meeting be postponed until the first fall meeting of the Association, on account of the program and the late hour. This motion was unanimously carried, and the meeting was adjourned by President Parham.

# *Washington Letter*

### Revision of Judicial Code

A REVISION of the Judicial Code would be effected by 1941 if the hope of Representative Walter Chandler, of Tennessee, is realized. He has introduced House Joint Resolution No. 388 which it is anticipated will be brought up early in the regular session of Congress convening in January, 1940. There has been undertaken no general revision since the present code was enacted March 3, 1911, although it has been amended about 200 times.

The plan proposed in the Resolution is to have a "Joint Committee on the Revision of the Judicial Code" to be composed of ten members, and the Chairmen of the Judiciary Committees of the House and of the Senate each would designate five members from his Committee to serve on this new Joint Committee. Its duty would be "to prepare a revision and recodification of the Judicial Code and other provisions of law relating to the judiciary (including in general all provisions similar to those included in title 28 of the United States Code), of a permanent and general nature."

It would be the purpose of the Committee to bring together all statutes and parts of statutes relating to the judiciary, omitting redundant and obsolete enactments, to reconcile contradictions, supply omissions, and to amend imperfections in the original text. They might also propose and embody in the revision changes in the substance of existing law; "but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for the same." The prepared text would be submitted to the Senate and the House, through their Judiciary Committees, "in order that the revision and recodification may be reenacted if Congress shall so determine."

The Joint Committee would be authorized to utilize the services, information, and facilities and also the personnel of the departments and agencies of the Government. It might employ experts and other assistants; but the members of the Joint Committee would serve without compensation in addition to that received for their services as Members of Congress, although they would be reimbursed for necessary expenses incurred in performing the duties of the Joint Committee. Expenses would be paid one-half from the contingent funds of each the Senate and the House.

One element which the Committee would have to consider would be the effect of the new rules of civil procedure as they apply to any phase of the judicial system. It would have the benefit of whatever experience shall have been acquired by the administrative office of the courts and of such statistics as will have been gathered by that office. The Committee would be expected to report, at the latest, sometime during the 77th Congress, which begins its first session in January, 1941.

### Calling Attention to Hatch Act

In a recent communication, Edward G. Kemp, the Assistant to the Attorney General, "again invites" the attention of all United States Attorneys, United States Marshals, Assistant United States Attorneys, and Deputy Marshals to the following provision of Section 9(a) of the Act of August 2, 1939 (Public No. 252, 76th Congress) known as the Hatch Act:

"'No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns.'" U. S. C. A. Current Service 1939, pamphlet No. 10, pp. 1242, 1244.

The invitation of attention continues: "For an officer or employee of the executive branch of the Federal Government to hold any office in any political party organization or political club, or to be a member of any committee of any political party organization or political club, is deemed a violation of the foregoing provision. Accordingly, if you hold any such office or committee membership, you should forthwith resign therefrom, or from your present position under the Federal Government.

"You are requested to acknowledge receipt of this circular immediately, and in the event that you have been holding office in any political party organization or political club, or membership in any committee of any political party organization or political club, to state whether or not you have resigned therefrom and the date of such resignation."

### The Plane of the Neutrality Discussion

The high plane on which the neutrality debate was conducted in the Senate on the repeal of the arms embargo has, very properly, received much comment. It was recognized as inevitable that this high standard should have been maintained when it became apparent that a considerable number of the Members were contending that we should be permitted to export trinitronaphthalene, tetranitronaphthalene, hexanitrodiphenylamine, trimethylenetrinitramine, and pentaerythritetetranitrate.

Others as strenuously contended that, under no circumstances, should our nationals or international guests be permitted to export methyldichlorarsine, phenyldichlorarsine, diphenylchlorarsine, ethyldichlorarsine, diphenylcyanarsine, phenlydibromarsine, ethyldibromarsine, or diphenylaminechlorarsine.

Then, there were the super-neutrals who, lest this very plain issue be oversimplified, insisted that we should not even be permitted to ship out any trichlormethylchlorformate, brommethylethylketone, ethylbromacetate, brombenzylcyanide, ethyliodoacetate, chlorvinyldichlorarsine, dichlordivinylchlorarsine, or monochlormethylchlorformate. U.S.C.A. 1939 Current Service, pamphlet No. 10, pp. 1516, 1517, President's Embargo Proclamation, Categories VI and VII.

### F. B. I. Speaks

The views taken by the Federal Bureau of Investigation of some of its problems and prospects were indicated in an address by Director J. Edgar Hoover before the Annual Convention of the International Association of Chiefs of Police at San Francisco. He emphasized that, if the internal defense of the Nation is to be preserved, "every effort must be directed in an orderly manner by thoroughly responsible, well trained, professional law enforcement officers, totally devoid of hysteria.

"In the wave of patriotism that is rising in the country there lies the danger of over-zealous groups or individuals engaging in acts which are distinctly un-American in method, no matter how patriotic in aim. We need no vigilantes in this situation. The vigilante method is distinctly contrary to American ideals of justice. The Federal Bureau of Investigation has been

called upon to investigate all matters relating to espionage, sabotage, and violations of the Neutrality Regulations. In turn the Federal Bureau of Investigation has requested cooperation of all law enforcement officers in the United States.

"It is the unfortunate plight of America, in this period of chaos in world affairs, to become the jousting ground for the subversive forces which work against our best interest, even our national existence. That these may go beyond the ordinary espionage activities and into the realms of sabotage, and the fomenting of outbreaks and riots, is, of course, not beyond possibility. Such things have been tried before."

In decrying the influence of corrupt politics on law enforcement, the Director continued: "Truthfully, no single criminal can correctly be given the title 'Public Enemy Number One.' That appellation can be claimed only by 'Old Man Corrupt Politics.' And he lives in practically every community in the land. No officer can truly promote law enforcement when he follows the precepts of crooked politics and himself indulges in corruption. It should be an inviolable rule that every law enforcement officer in America should be fingerprinted before he is given a shield of authority and those prints sent to the FBI in Washington for search against the criminal records. Not until the International Association of Chiefs of Police goes on record as demanding this protection can it be truly said that the police departments of this country are making a determined effort to free the inner ranks of law enforcement from those destructive agents who do so much to stain its name."

Mr. Hoover stressed the necessity of furthering police training and noted that the next session of the FBI National Police Academy, when it convenes in January, 1940, will occupy FBI's modern Training Center, at Quantico, Virginia, which is located between 30 and 40 miles below Washington, D. C. He said that the establishment of this Training Center "fulfills a dream of many years—it establishes a veritable 'West Point of Law Enforcement.'"

### Col. Fleming to Wages and Hours

It will be the task of Lt. Col. Philip Fleming, 52 year old Army engineer, as the newly appointed wages and hours Administrator, to make quick, effective, and comprehensive, the operation of the year-old program to keep a floor under wages and a ceiling over hours. He will start with an inheritance of about 13,000 complaints of wage-hour law violations, which should provide ample tinder for what has been described as his flare for direct action.

"A builder and engineer who can see the social side of problems," is the way one of his associates describes Col. Fleming. Another friend has said that he "knows so much about red tape that he knows how to keep it from getting around his desk." He will have an enlarged legal and inspection staff. The legal staff has been increased from 50 to 80 lawyers in order to handle the complaint cases. Officials have explained that a gradually expanding force of wage-hour lawyers and inspectors has not been able to catch up with the large volume of complaints, chiefly because of the need for more money than Congress has supplied.

One of the early tasks of the new Administrator will be to coordinate the Wage-Hour Division and the Public Contracts Division. This will involve changes principally in the field, where organizations now are maintained by both divisions. For this purpose Col. Fleming will serve as a special adviser to the Labor Department.

It was indicated that the previous plan of decentralization of authority will either be perfected, modified, or discarded; and that the new plan will delegate to 16 regional directors and their staffs sufficient authority to handle regional wage-hour problems without having to write or telephone for instructions to Washington. At the last report, only five of the regional directors had been named, although in several places supervising inspectors or the regional lawyers have been acting.

The speeding up of the industry committee work is another job awaiting early attention. These are the committees set up to consider the highest possible minimum wage rate for each industry. Under the law, the minimum scale was to rise gradually from 25 to 40 cents an hour, the 40 cent limit being reached in six years—and the rate having stepped up to 30 cents at midnight, October 23, 1939.

### Civil Liberties Address of Attorney General Murphy

Attorney General Frank Murphy's address before the National Conference on Civil Liberties, at Hotel Biltmore, in New York City was entitled: "The Test of Patriotism." His keynote was that "the finest contribution which America has made to civilization is our loyalty to the idea of civil liberty."

He warned that "in our zeal to protect ourselves from internal aggression, we must be on guard that we ourselves are not guilty of aggression against the civil liberties of our own citizens. We must not fall victim to the infection of despotism that in recent years has been sweeping the world. For if we suppress civil liberty, we suppress democracy itself." He spoke of the need of our remembering that it is right and just for our democracy, in an emergency, to be on guard against internal attack by foreign agents as well as by people in our own ranks; but that "an emergency does not abrogate the Constitution or dissolve the Federal Bill of Rights. That is not only good sense; it is good constitutional law."

The Attorney General indicated that the problem of the friends of civil liberty was that "of finding a sound basis for maintaining public safety without encroaching on the Bill of Rights." He quoted from the Supreme Court's decision in the Milligan case, one year after the Civil War, to the effect that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Approaching the close of his speech, he declared: "We must have it understood that while we will oppose firmly and vigorously any illegal activities, we will do so in a responsible manner and within the orbit of the Constitution. That is the American way." As a formula to help us keep a true course, the Attorney General quoted the words of Justice Holmes, in a celebrated wartime case, to the effect that—

"When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . . While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe—unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

He also recalled this question which Abraham Lincoln put to the Congress of the United States: "Must a government of necessity be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"

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# ORIGINAL CIRCULAR CALLING ORGANIZATION MEETING AT SARATOGA, N. Y.

(Slightly Reduced)

DEAR SIR:

It is proposed to have an informal meeting at Saratoga, N. Y., on Wednesday morning, August 21, 1878, to consider the feasibility and expediency of establishing an AMERICAN BAR ASSOCIATION. The suggestion came from one of the State Bar Associations, in January last, and the undersigned have been favorably impressed by it. A body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse, might be not only a pleasant thing for those taking part in, but of great service in helping to assimilate the laws of the different States, in extending the benefit of true reforms, and in publishing the failure of unsuccessful experiments in legislation.

This circular will be sent to a few members of the Bar in each State,—whom, it is thought, such a project might interest.

If possible, we hope you will be present on the day named at Saratoga; but in any event, please communicate your views on the subject of the proposed organization to Simeon E. Baldwin, New Haven, Conn., who will report to the meeting the substance of the responses received.

BENJAMIN H. BRISTOW, KENTUCKY,
WILLIAM M. EVARTS, NEW YORK,
GEORGE HOADLEY, OHIO,
HENRY HITCHCOCK, MISSOURI,
CARLTON HUNT, LOUISIANA,
RICHARD D. HUBBARD, CONNECTICUT,
ALEXANDER R. LAWTON, GEORGIA,
RICHARD C. MCMURTRIE, PENNSYLVANIA,
STANLEY MATHEWS, OHIO,
E. J. PHELPS, VERMONT,
JOHN K. PORTER, NEW YORK,
LYMAN TRUMBULL, ILLINOIS,
CHARLES R. TRAIN, MASSACHUSETTS,
J. RANDOLPH TUCKER, VIRGINIA.

JULY 1, 1878.

Courtesy Law Library of Yale University

# THE ACHIEVEMENTS OF THE AMERICAN BAR ASSOCIATION: A SIXTY YEAR RECORD

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*Professor of Law in the University of California;*
*Member of the Bars of California and New York*

CONTENTS



## CHAPTER I
### THE BEGINNINGS

THE Constitution of the United States was made by lawyers. A majority—in some cases, a large majority—of the men who sat in our earliest Congresses and State Legislatures were lawyers. That is to say, they were men who made public profession of a competence in regard to matters of law, a competence greater than that of the average man. We may also safely say that they had been duly "called" or "admitted" or "licensed" to appear on behalf of those persons in their communities.

When our country took its present form, consequently, the profession of law already had a history. We shall, however, be ill-advised if we assume that when we speak of lawyers at the beginning of our constitutional history we are speaking of men quite like those whom we so designate at the present time. The lawyers who took part in the formation of the constitution and in the debates of our first legislature varied immensely, as of course they still do, in training, ability, and experience; but as far as their legal knowledge is concerned, we may assume that the majority of them had picked it up more or less at haphazard and that the segregation of the legal profession from the ordinary group of the community, the farmers, the shop-keepers, the merchants, the ship-owners, was not always marked, much less marked than it is today.

None the less, poorly segregated or not, lawyers were an important section of the community and despite the unpopularity that has attended the profession played a decidedly significant part in almost all communal activities. The causes that have made lawyers unpopular we need not investigate here, and it is necessary to mention the fact only because it is a factor in the history of the profession. It created difficulties that other professions did not encounter and it provided an atmosphere within which the attempt at organizing the bar and making it operate effectively as an organized institution had to be carried out.

It was not till well toward the end of the nineteenth century that the need of a unified bar in the entire country began to manifest itself. It was in a way part of the same process that made a single country out of a group of communities that had developed under different conditions and that faced different problems, economic, social, physical, and political. Indeed, the differences were so great that the unity necessary for a nation was difficult to find and it might well have been the case that the normal historic processes would have created out of this material, not one nation, but several nations.

Unifying forces, however, were also present. And the two most important were surely the common language and the common law, in which we may take the word "common law" in both the literal and its technical sense. The body of law which had been our country's heritage from England had certain definite doctrines, but as a matter of fact the most characteristic of these doctrines—those which seemed to seventeenth century lawyers to mark the common law system more than anything else—had already been sharply modified by the middle of the nineteenth century and at the time of the foundation of the American Bar Association the common law had lost still more of the distinctive elements which formerly made it stand in so sharp a contrast to other legal systems.

But what the common law system originally had and what it had only very slightly changed, was less a set of doctrines than a method of approach. A common-lawyer was different from a civilian not so much because the legal principles of the two systems were in conflict as because the way of stating and asking legal questions was different. Whatever legal diversities grew up in different parts of the country, unity was advanced by the fact that almost everywhere American lawyers used the methods of the common law—both the more commendable and the less commendable elements. Everywhere precedent seemed more important than legislation with the result that legislation was not carefully managed. Everywhere practical results were consciously in the mind of courts and lawyers, with the result that law and life were not allowed to grow too far apart. Everywhere the authority of the judge was based upon the common law notion which makes him a vital factor in the legal process and not on the conti-

nental notion which makes of him a ministerial, more or less bureaucratic, official.

The country was substantially aided in the effort at unification by this common legal attitude and the profession in which this attitude was embodied, would have unconsciously helped the country form itself, by merely acting as a profession. We may say that this process became conscious when the lawyers of the country determined to give a definite form and a definite responsibility to their activity, and the longest step in that direction was taken when the American Bar Association was formed.

On June 1, 1878, fourteen American lawyers of national repute, representing as many states, issued a call to a few members of the bar of each state inviting them to an informal meeting to be held on August 21, in order to consider the "feasibility and the advisability of establishing an American Bar Association. The suggestion," said this document, "came from one of the State Bar Associations, in January last, and the undersigned have been favorably impressed by it. A body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse, might be not only a pleasant thing for those taking part in it, but of great service in helping to assimilate the laws of the different States, in extending the benefits of true reforms and in publishing the failure of unsuccessful experiments in legislation."

Some sixty-nine men from nineteen states (including the District of Columbia) met in answer to this call. Mr. Benjamin Bristow of Kentucky was elected President, and Francis Rawle of Pennsylvania and Isaac Grant Thompson of New York, Secretaries. The moving spirit both in the call and in the organizing meeting was Simeon E. Baldwin of Connecticut and Yale. The Conference was more than doubled by the admission of a number of attorneys who had signified their interest in the proposed association, and proceeded to adopt a Constitution.

The first Article of the Constitution declared the name and purpose of the new organization. It ran as follows:

"This Association shall be known as the American Bar Association. Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar."

The purposes were, it must be confessed, somewhat miscellaneous. The first two are general and lofty in tone. We shall have occasion more than once to recur to them. The last two are the familiar—shall we say, the self-regarding?—purposes of all organizations of men engaged in a common pursuit. They have, however, a special and historic justification in the case of the legal profession. The third is a practical goal which, taken literally, might have committed the new Association to advocating a common code for the entire country. It was not meant quite so broadly, but it indicated something which was to be a permanent part of the effort of the society—the accomplishment of specific tasks for the improvement of the legal system of the country.

Associations of lawyers were, of course, no new thing. It was no new thing in the United States. There had been organizations of lawyers in the various states before 1878—in some cases, well-established ones. Some of them were state-wide. It was, as we may note, on the suggestion of a State Bar Association that the call had been issued to create this national one. There had further been local lawyers' associations and clubs in many cities. Some had existed even in Colonial times. And in most of them, the purposes announced were the last two mentioned in the first Article of the Constitution of the American Bar Association. The lawyers associated themselves in order to stimulate their sense of fellowship and to advance their own interests, provided we recall that the interests of such a profession as that of the law were primarily to be found in the standing of the entire group in the community. We shall not go far wrong if we call these the "guild purposes" of the organization.

And these "guild purposes," as we well know, are of the essence of the Anglo-American tradition. Lawyers constituted a guild in England in the strict and technical sense of the word, from the end of the thirteenth century on. It was through this guild that, properly speaking, they became a profession, because before its creation, lawyers were usually many other things as well as lawyers.

For these many centuries, then, the English lawyers had been united in a brotherhood, a close corporation, functioning like all such medieval brotherhoods, and very much like the trade and mercantile guilds of the same time. This, we may remember, was in no sense a dishonoring comparison. The members of these mercantile and trade guilds were men who ranked as the lawyers did, below, but only just below, the baronial class. The government of the towns was in their hands and they exercised a powerful influence on the affairs of the kingdom.

And as in the cases of all the guilds, the guild or "mystery" of the law had two aspects. One was that of maintaining and enjoying their monopoly. The number of lawyers—even if we put together serjeants, barristers, and attorneys—was never large. The upper class, that of serjeants, was very small indeed. The monopoly was strict, lucrative, and exclusive, as in all organizations of that kind.

But there was a second and less selfish aspect. The mercantile and trade guilds were organized not only to protect their interests, but also to maintain the standards of their craft, both the standards of skill in the commodities produced or sold, and the standards of fair-dealing and honor in their relation to each other and to the public. Competition existed, but the monopolistic control of the trade made it both unnecessary and undesirable to permit competition to be vigorous and unscrupulous.

The lawyers of the craft were in the same case. They meant to maintain their monopoly by the same methods as those used by their fellow-guildsmen. Entrance was by means of a long and toilsome apprenticeship. Admission even to this apprenticeship was limited. But, equally, they had a dignity to maintain. In the case of the lawyers, the standards on this point were higher than those of other guild-like organizations.

And all this type of society had a basis of fellowship. Each guild had its house. The lawyers had several, the famous Inns, where they lived together as young men, and dined and feasted together when they were older.

In the Colonies, the creation of organizations both for the purpose of limiting the practice of the law to qualified persons and the purpose of having opportunities for mutual intercourse had gone on apace. A club

called the "Sodality" was formed in 1765 in Massachusetts of which Otis, Gridley, Adams, and Quincy were the leading spirits. It was expected that by means of it, the lawyers would "form their style upon the ancient and best English authorities." A little later, in 1770, the "Moot" was founded in New York as a club "to encourage a more profound and ample study of the civil law, historical and political jurisprudence and the law of nature." Men like William Livingston, Samuel Jones, and "young" men like Jay, Benson, Richard M. Smith, Robert L. Livingston, Lindley Murray, attended its meetings. Once, it is reported, a Chief Justice of the Superior Court sent a question to the Moot for advice. More or less convivial meetings at particular taverns were permanent customs of the bar in several places.

It is in the highest degree noteworthy that the American Bar Association kept itself close to tradition in the announcement of its purposes. Like the medieval guild from which legal association sprang, the "honor of the profession" figured largely. And again like the guild, the opportunities for mutual intercourse —the notion of fellowship and brotherhood— were emphasized. But at the beginning of their declaration, the Association set what cannot have been meant as a mere glittering generality, a sonorous platitude, if they were true to their traditions. The advancement of the science of jurisprudence and the promotion of the administration of justice are quite analogous to the maintenance by the medieval guild of rules of fair-dealing and high standards of skill.

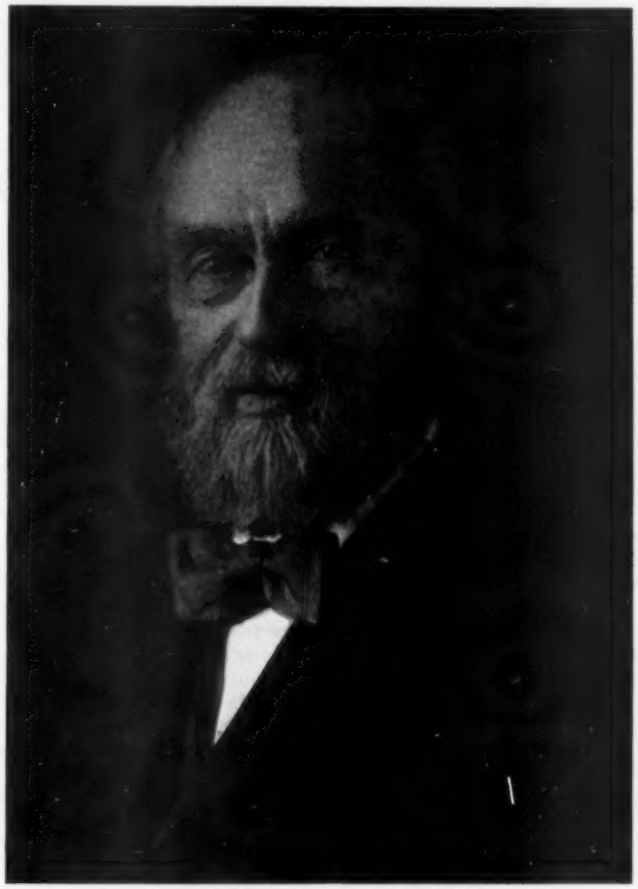
The one interest which the American Bar Association does not declare it will protect was the one which to many of the ancient guilds was the paramount purpose of association. That was the economic interest, the monopoly character of the profession and its exploitation. The reason that nothing is said of this is that the monopoly character of the legal profession had long disappeared. As we shall see, it was ludicrously easy to become a lawyer, and the attempt to form a close corporation of existing lawyers with a policy of strict exclusion of all applicants except on onerous terms, would have been justly repudiated.

However, one thing was clear. If the honor of the profession was really to be maintained, something more than a mere announcement to that effect would be necessary. In 1870, Samuel J. Tilden said to a group of lawyers in New York:

"It cannot be doubted—we can none of us shut our eyes to the fact—that there has been in the last quarter of a century, a serious decline in the character, in the training, in the education, and in the morality of our bar."

The situation had arisen from a popular theory which was based on a wholly erroneous notion of the nature of the profession. It had resulted in a condition in which all the popular dislike, suspicion and distrust of lawyers was intensified and in a measure justified.

The American Bar Association by its very existence created a class of lawyers of an obviously superior grade. Membership, in a measure, was by invitation. But clearly, in a democracy, a self-constituted and self-perpetuating group of lawyers of repute, would be even more scandalized by a corrupt and inefficient bar, than the generality of the profession was, while it remained unorganized. The relation of the lawyers of the American Bar Association to their fellows, the high rank of the leaders of the movement to associate, imposed a responsibility on them. Their honor was the honor of the profession, and there was no more important nor more immediate task than to take steps to raise the character and the intellectual qualification of all the members of the bar.



SIMEON E. BALDWIN
Moving Spirit in Organization of Association; President 1890-1891

Evidently, an economic advantage would be gained by a restriction of numbers. And in view of the prevailing cynicism of the public toward all pronouncements that come from an organized profession, it will be hard to convince those who are determined to be suspicious, that this advantage was not the sole purpose of the association. It may be well, however, to remember that if restriction had in itself seemed desirable, a concentrated effort in this direction would almost certainly have been made. And in view of the influence and standing of the members, it would have had a certain effect. The Association approved of no such narrow policy. It was a better qualified bar they sought, and not merely a smaller.

The history of organization in the medical profession shows many similarities and some contrasts. There

had been medical societies in Colonial times. One such society, organized in New Jersey in 1760, had had a successful history for decades. In 1806 a state Medical Society was founded in New York which almost at once moved aggressively to end the evils caused by incompetent practitioners. And in 1846, a generation before the founding of the American Bar Association, the American Medical Association was founded, which has been successfully functioning ever since.

But, in a sense, organization on this scale in the medical profession was a little premature. About 1845, just before the American Medical Association was founded, there was a decided slump in the effectiveness of such societies. The country was full of quacks and nostrums and of quack-and-nostrum peddling "movements." Fully a third of the existing local medical associations disappeared at this time, and in many states there was no body which could take the responsibility of advocating reform and protection of the public health.

A change for the better took place, when the new spirit of the country found some of its expression in the organization of the American Bar Association. The Academy of Medicine was founded at about the same time. The problems which the Bar was attempting to solve were met here too. Indeed, it was notable that, small as was the number of college-trained men who then entered law, the number of such men who entered medicine was still smaller. This, at any rate, appears from a carefully prepared study, which Dr. McIntire presented to the Academy of Medicine in 1883.

A further comparison of the careers of the two great professional organizations may be left for later examination. For the present, we may mark the fact that the creation of the Bar Association and the revivification of the American Medical Association took place at almost the same time.

The year 1878, which saw the birth of the American Bar Association, was significant in many ways. The disastrous effects of the Civil War were almost over. Worse, perhaps, than the actual destruction of lives and material goods during the four years of conflict was the aftermath of political demoralization that had taken place. The Reconstruction period in the South was something to which we now look back with a shudder. But the actual political conditions at the National capital were even more of a disgrace. Open corruption was apparent, the spoils system entrenched, and the sale of offices and advantages carried on, little less than publicly.

There was an apparent turning point at the end of Grant's second administration. A general revulsion of public feeling of itself created a demand for reform. The disputed election of 1876 and the final determination in favor of Hayes in the early months of 1877 are themselves indications of a change of public feeling. That so dangerous a political crisis was so peacefully passed, was a great tribute to the sanity and the self-restraint of political leaders. A movement for a trained civil service was almost immediately instituted.

Not only in politics, but in economics, a new era was on the threshold. The eight years from 1877 to 1885 were years of greatly accelerated expansion. Population was increasing. New sections of the country were being rapidly filled. There were, of course, difficulties caused by the increase of public and private debts and the momentous questions of money and credit-control were already vigorously debated. But in the main, it was an era of revived hopes, of released energies. The founding of the American Bar Association was one of the symptoms of this renewal of public and private enterprise.

## CHAPTER II

### THE FIRST COMMITTEES

WHEN the American Bar Association met, it set up six Committees with the following designations: 1. On Jurisprudence and Law Reform; 2. On Judicial Administration and Remedial Procedure; 3. On Legal Education; 4. On Commercial Law; 5. On Publications; 6. On Grievances. We shall see that the first Committee, despite its broad title, proposed a moderate and practical activity for itself—at any rate, at first. But the second, third, and fourth Committees had definite purposes which were felt to be urgent, and it was hard to say that any one of the three was more important than the others. On the professional side, it was imperative that new standards should be set. Untrained lawyers created incompetent judges and such judges were yearly and monthly establishing law. It was clearly impossible that a good law could issue in this way, if we mean by good law—as we generally do—a law that is in accordance with the principles of the common law in the modern progressive form which the common law has assumed in both England and America.

The Committee on Judicial Administration and Remedial Procedure was faced with a problem that was created by a different type of inadequacy. The United States was recovering—slowly and spasmodically—from the effects of the Civil War. Economic rehabilitation brought increasing business and increasing litigation. In addition, the population was rising at a constantly accelerated rate. In spite of that fact, frontier conditions still prevailed in many parts of the United States. There was still a great deal of vacant land, there were still large sections imperfectly supplied with means of communication, still inadequate police and a frontier attitude toward crime and its repression in many parts of the country.

These physical and economic conditions made uniform measures of reform difficult. The needs of the various parts of the country were extremely different. But reform of some sort in judicial administration was imperative, and the immediate objective was, as we shall see, the increase of judicial machinery to meet the rapid multiplication of the demands upon it.

The fourth Committee, that on Commerial Law, had a somewhat different field from those of the others. Inadequacy of prospective judges and of judicial machinery was a matter which, while fundamental enough, might seem to the layman a technical question. Uniformity of law was certainly not. Two generations of Americans had known railroads; a full generation had known the telegraph. These instrumentalities were welding the country into an economic unit. The state barriers created by history and sentiment—although the sentiment was thoroughly real and important—seemed an intolerable nuisance for business. And it was found that the diversity of law which these state barriers created was an even more intolerable nuisance. The diversity of law was, as a matter of fact, felt all the more strongly because the method of approach to the law was obviously the same.

Under such circumstances, on the Continent of Europe, there would doubtless have been an immediate development of a movement for complete uniformity of

law by means of a national code. Americans and Englishmen, however, do not react that way. The Committee on Commercial Law was instructed—

> "to enquire and report on the condition of the law touching the form and requisites of negotiable or commercial paper, and the steps requisite on the part of the holder to fix the liability of parties to such paper with special reference to the diversity of such requisites in the several states—and to furnish suggestions as to the expediency of action on the part of the Association looking toward further uniformity in the law on that subject."

Nothing could bring out the American point of approach more clearly. A uniformity is "to be looked toward," not a uniformity in general or of commercial law, but in one special matter—or rather in two or three specific matters—of commercial law. It is not assumed that uniformity can be achieved, or even that it is necessarily desirable. The Association wishes to examine the question.

But, quite characteristically, those who felt the need of such a Committee, indicate that the ultimate goal is uniformity. The associated lawyers of the country face the fact that a new step must be taken. Particularism and the growth of local institutions had served us well, and it might have seemed that we could properly enough leave to our common language and common patriotism the task of maintaining the unified nation for which we had fought a bloody war.

But there was evidently a new factor. The increase of communication was making an economic unit of the United States to an extent we had not known before. The citizens of a state did business not only within the boundaries of the state itself, or with their immediate neighbors, but with every state, and not merely occasional and trivial business, but an increasingly large part of it. This was impeded by the diversity of legal rules on the most practical and everyday means of transacting business, i.e., commercial paper. But the Committee certainly envisaged the fact that the same situation existed on a much larger scale, and we may be sure that their hopes were not as tentative and cautious as the formal resolution of instructions.

None the less, it was long before the Committee made any effort to undertake the larger function which its creation adumbrated. We shall note in a later chapter that the time at which the American Bar Association was formed was the very time when the question of general codification was most vigorous. The general opinion of the lawyers of the country was opposed to codification. Insistence on carrying out a uniform law even on so vitally practical and limited a matter as commercial paper would have met resistance that was based on the opposition to codification in general. By the end of the next decade, the time was more nearly ripe for further developments along this line.

The tendency to deal with proposals on as technical and limited a footing as possible showed itself elsewhere as well. The Committee on Judicial Administration and Remedial Procedure was certainly conceived on a large scale and had a comprehensive problem within the scope of its authority. But it was held to a much more modest and circumscribed activity. It had been instructed merely to consider "modes of taking testimony," just as the even grandioser Committee on Jurisprudence and Law Reform could also read in its mandate nothing more extensive than the "law touching the mode of taking testimony and perpetuating testimony out of court"—a task, one might suppose, that might well have been delegated to committees of less lofty designation. But it is of real significance that the Association in its first meeting created instrumentalities which, whatever their names, were to be ready for far-reaching activities and which were instructed to limit their first efforts to a modest and practical result. And it is further significant that the first real project it sponsored was a reform of high value and importance, destined to modify profoundly the entire Federal judicial system.

## CHAPTER III

### THE CIRCUIT COURT OF APPEALS

IT was not till the fourth meeting of the Association in 1881, that, on a motion of Henry Hitchcock of Missouri, the Committee on Judicial Administration and Remedial Procedure was instructed to consider and report some means of remedying the delay of justice caused by the situation in the Supreme Court. That tribunal was no less than eleven hundred cases behind its docket. It was estimated that three years would normally elapse between the noticing of an appeal and its final determination. If dilatory tactics were attempted by either side, it would take much longer. So serious a delay was, as sensible persons have agreed at every stage of development, tantamount to a denial of justice.

Delay of justice was, of course, not confined to the Federal courts. In many of the states, delays were far greater, and these delays affected, not the highest court which dealt with only a small part of the litigation of the community, but the trial court. But the American Bar Association was a national body. It could, and as it grew it did, deal with matters which were primarily the concern of a small number of states, a number much smaller than that of all the states of the country. But evidently its most characteristic field of activity was that which concerned the entire country. As far as the courts were concerned, that field would be the Federal system.

The growth of the Federal judiciary system is one of the developments of our constitutional life which was least suspected by the founders of our government. The Constitution established only one court, the Supreme Court. We need not enter into the heated controversies which have gathered about the original purpose and scope of the Supreme Court, but it is quite clear that it was not assumed at first that it would be a very busy one.

None the less, the Constitution contemplates that inferior Federal Courts might be necessary and it authorizes Congress to establish them. This was done early enough, but the effect was not quite the one anticipated. I think we may assume that the courts were designed for a special jurisdiction, a differentiation *ratione materiae,* from that of the state courts. As a matter of fact what took place was the development of a system that in many instances paralleled and rivaled that of the state courts. The basis of this rivalry was the fact that Federal jurisdiction could be acquired because of diversity of citizenship and since an increasingly large amount of business was done by corporate bodies and since many of these corporations were foreign corporations, i.e., were not incorporated in the states in which most of their business was done, occasions were multiplied for utilizing diversity of citizenship in order to enter the Federal

courts rather than the state courts. The case which more than any other created this situation was Swift vs. Tyson, decided in 1842 (16 Peters 1.). Whether the recent case of Erie R. R. Co. v. Tompkins (304 U. S. 817) in which the doctrine of Swift vs. Tyson was formally and specifically repudiated, will make a substantial change in the situation, it is of course too early to determine now.

This was quite within the common law tradition where rival and parallel courts, originally intended to be specialized for certain kinds of questions, managed to exist and to compete for legal business, and to do so without either frustrating justice or rendering it ridiculous. But one thing is certain. This situation does not render justice expeditious or simple.

The fact that the Federal system had become a competing one was due to a marked preference for it by many litigants. This preference is by all ordinary standards an inexplicable one. The state courts are for the most part composed of judges elected by popular vote. The Federal judiciary is appointive. The juries in the State Court are taken from the broadest panels. The Federal juries are far more selective.

In spite of the fact that the state courts are thus more "popular," a decided preference was shown for those of the Federal system and the result was the crowding of the calendar of the Supreme Court with cases involving routine matters of common law. It was this situation which presented itself to the Judiciary Committee of the American Bar Association.

We may state briefly that the final result of the work of the Association was the establishment in 1896 of the present system of Circuit Courts of Appeal, now divided into ten Districts. For this result the Bar Association may claim full credit. Not only was the matter first fully discussed by its Committees and debated in its meetings, but it was a member of the Association, Wm. Evarts, who, as Senator, prepared and secured the passage of a bill which was based on the work done by the Association. It took twelve years, but it illustrates one of the most appropriate types of activity of an organization of this type, since it was directly and primarily in the public interest and against what in the popular mind is assumed to be the interest of the profession. All the debates emphasize this phase of the matter. What was consciously sought and finally obtained was a method of shortening legal procedure, although it is clear that there is more opportunity for financial gain for lawyers in protracted litigation.

But what is especially significant is not merely the fact that the Association undertook a measure of necessary reform and carried it through; even more significant were the methods which were employed in determining how the situation which needed remedying was to be corrected. This exhibits the Association not merely as a public service body, but as a group of trained experts examining as thoroughly as was possible the nature of the problem before them.

That problem, we may remember, was the practical one of relieving congestion in the docket of a court. But it was not treated merely as a practical problem. The committee considered the following proposals:

1. The Sawyer Plan, to enlarge the Supreme Court to eighteen, sitting in two independent divisions. The entire court was to be called the "National Court of Appeals."

2. The Manning Plan. The existing court was to be divided into three divisions of three each, one for equity cases, one for common law and one for admiralty and revenue. The court was to meet in banc only to consider cases requiring the construction of the Constitution, or a treaty, or as a court of error from a final determination in a state court. The court might further, if it desired, but not as a matter of right, order a rehearing of a case in banc decided in department.

3. The Davis Plan. This would establish intermediate Circuit Courts of Appeal whose decisions would be final in all cases involving less than $10,000, except where a constitutional question was involved.

An additional suggestion was made in the meeting of 1883 by the Pennsylvania representatives urging approval of what was called the Philadelphia plan. This wished to segregate all cases depending on diversity of citizenship. For such cases an intermediate Circuit Court of Appeals was to be established which would be final for most matters but would allow an appeal when the amount in controversy was very high. For all other cases, the existing system which knew only two instances was to remain.

It will be seen that several types of rather thoroughgoing changes were actually canvassed. According to one, the Supreme Court was to be changed completely in character. Only matters of vast economic importance would be considered by what would be much less a court than a judicial assembly of eighteen persons. Another plan differentiated the cases that would come to the Supreme Court by subject matter and leave the Supreme Court proper—the entire bench of nine—to deal only with constitutional and similar questions. Still another—the plan finally adopted—sought deliberately to diversify the law as propounded by the courts, by adapting it to the special needs of sections of the country.

It is hard to see what type of appellate reorganization was omitted, and it is important to note that fifty years ago, the assembled lawyers of the United States feared neither to examine plans for a complete reshaping of the highest court of the country nor to give serious attention to a great diversity of sentiment on the subject.

The discussion, as it arose in successive meetings on these various plans, illustrated once more the fully representative character of the men assembled in these meetings. Of all the plans suggested, one, the first or the Sawyer plan, might or might not have had merits on the basis of theoretical considerations. But it was obviously the least in accordance with American feeling or tradition. We are, therefore, not surprised to hear in the earliest committee report that neither the majority nor the minority thought very much of the plan and that it was not expected to receive much popular support.

Of the other plans, the majority preferred the Davis plan which provided for intermediate courts of appeal; the minority, the plan which divided the court into departments with differentiated subject matter. Attention was called to the fact that the difference of opinion between majority and minority was geographical as well as substantial. The majority represented chiefly the newer states of the West and Middle West. The point was made that one of the difficulties of the existing situation was caused by the expense and time involved in concentrating all appeals at Washington.

It was this consideration that finally prevailed, even to the extent of winning over Senator Evarts who had originally supported the departmental plan. That the Circuit plan would result in creating eight or nine separate jurisdictions and that conflicts of various sorts

JAMES O. BROADHEAD
President 1878-1879

FRANCIS RAWLE
Treasurer 1878-1902; President 1902-1903

BENJAMIN H. BRISTOW
Permanent Chairman of Organization Meeting;
President 1879-1880

EDWARD OTIS HINKLEY
Secretary 1878-1893

would develop was inevitable. But those who pointed this fact out had to consider the possibility of conflicts between departments and to weigh the disadvantage of possible conflict with the advantage of a closer response to local conditions. Considerations of this type are apt to be controlling among Americans and it is not surprising that they ultimately determined the action of the Association.

Indeed, the ventilation of these divergent views brought into relief the essential realism of the American legal mind, however much it uses the language of rule and principle. To the objection that the departmental method would deprive a litigant of a decision by the entire full Constitutional Court, Mr. Troy of Alabama replied that in practice decisions by the entire full court were very rare. What happened usually was that the opinion was the work of one man and that at most two or three others were sufficiently interested to examine the case in any detail and give an independent decision on it. The rest merely acquiesced. The division into departments would accordingly not change the actual situation.

We may note, accordingly, that a favorite complaint of modern lawyers, the complaint directed against "one-man opinions," is in no sense a present-day invention, and that a half century ago, lawyers—some lawyers—of importance were ready to accept it as a fact and adjust the judicial system to it.

The success of the Association in this, its first attack on a major problem, is, therefore, noteworthy not merely as an indication that professional opinion could be effectively massed for a matter of general concern, but also that modern plans of reformation may profitably be examined in the light of this discussion of fifty years ago. The arguments that are advanced today are essentially the arguments advanced then. It is possible that the cogency of the reasons offered will seem to be lessened by our greater experience, in some cases will seem to depend on conditions no longer existing. But in any case, it cannot fail to be of value to go over the ground that the Association did then, if only to discover that many ultra-modern points of view are not as novel as they seem.

How well the Circuit Courts have met the problem originally presented is a matter which it is difficult to decide. It seems clear that when the question was first presented the principal goal in view was that of relieving the Supreme Court. And in that respect, the creation of the intermediate instance has indubitably been of incalculable benefit. We have only to ask ourselves what the situation would have been if the mass of decisions that have been handed down by the Circuit Court of Appeals in the last fifty years had been presented to the Supreme Court. The burden must inevitably have either overwhelmed that body or forced it into one of the forms of reorganization that had been rejected, after careful discussion. We can only speculate on the judicial scene that would thus have come into being.

Three judicial instances—a trial court, an intermediate court of appeal, and a final supreme court—form a fairly common pattern in the legal systems of most modern countries. But the corollary of these instances is delay and more delay and the only way in which this can be avoided is the time-honored one of limiting appeals to the last tribunal. There are several methods by which this has been effected. That which is in use in the United States system is the method of allowing very few appeals as of right and in general permitting cases to go before the Supreme Court only if that body wishes to hear them. The common law writ of certiorari serves this purpose well.

The free use of the discretionary power to grant certiorari has had an inevitable consequence. The ten circuits—nine until recently—have grown into semi-independent jurisdictions. There is a "circuit law" on a great many questions and before any reasonably accurate prognostic of the Federal law on a subject can be given, the first tack is to note the circuit in which the situation took place.

In the relatively few cases in which certiorari has been granted, the curious fact has developed that reversals are more frequent than affirmances. In a report made it has even happened that in all the cases of one year—to be sure only sixteen—the decision of the Circuit Court has been reversed. That is not quite as striking a fact as it appears to the layman. The mere fact that certiorari is granted already suggests a dissatisfaction with the decision of the court below, and therefore a reversal merely confirms the impression the case originally made in the Supreme Court. Indeed, it often happens that the briefs and the statement of the case are as full in an application for certiorari as they are in the final appeal of the case. But the frequency of these reversals has given an additional element of uncertainty to the law of the various circuits and has made final determinations there seem final only by accident.

A right of appeal that is purely discretionary with the court appealed to, has the obvious disadvantages just described. A right of appeal as a matter of course has even greater disadvantages. Indeed, it would create the very evils that prompted the Bar Association originally to examine the situation and occasioned the organization of the Circuit Court of Appeals.

It may well be that existing difficulties will once more bring the situation before the Association and perhaps make it necessary once more to revise the machinery of the Federal courts. The record of the Association in this matter is an augury that the problem will be thoroughly canvassed and reasonably solved.

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### Wyoming's Bar Integration Act

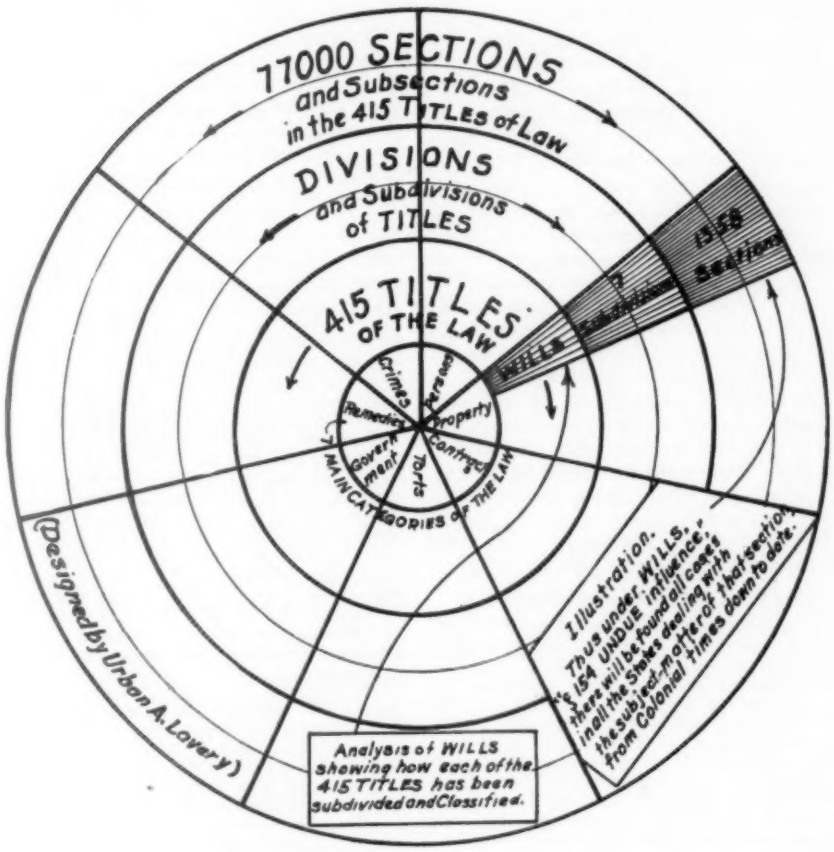
Through inadvertence, the JOURNAL has heretofore failed to make mention of the Wyoming Bar Integration Act, which passed the legislature early in the year and was approved April 20, 1939. The measure passed is known as "the short act," which has been adopted in various other States and this form was chosen because it was thought it would be easier to get it through the Legislature than a more involved measure.

Once several years ago the Wyoming lawyers were on the point of securing a Bar Integration measure and failed only because of an error by an engrossing clerk. An Act which followed the Idaho Act was prepared by Mr. Charles E. Lane and passed the Senate and House during the closing days of the session of the Legislature which met in January, 1931. In the rush in the Senate an engrossing clerk left off a short and inconsequential amendment and the Acting Governor vetoed the Bill because of this omission.

# A FORMULA FOR FINDING THE LAW

By Urban A. Lavery
*Member of the Chicago Bar*

*Design Illustrating Classification System for the Law.*




"A few men are already taking the lead in the work of Classification—some, great teachers; some, great judges; some, great practitioners. But these few play only a small part in administering the law. The thousands of judges and tens of thousands of lawyers in all the cities and villages of this great country are doing that and the problem of classifying and simplifying our law involves the need to carry to the great mass of them, present and future, a comprehensive and discriminating understanding of the legal principles of Classification which form the thread of Ariadne for guidance through the labyrinth of decisions." Elihu Root in his Presidential address to the American Bar Association, 1916.

### Preliminary Comment

THIS paper is the result of twenty-five years' experience in the actual practice of law in a large metropolitan city; plus five years of intensive and varied editorial experience in the law-publishing world. It is an effort to coordinate those two experiences, and to bridge the wide gap which has grown up between these two fields of our American jurisprudence. For there is such a gap. Indeed it may almost be stated as a maxim that the law-book world has largely gotten out of hand, so far as its *utility* is concerned. A modern law office library has become a sort of Juggernaut that is slowly wheeling down on the Bench and the Bar. It is with this situation in mind that we are attempting, so to speak, to write a prescription for greater utility; and especially to suggest a specific formula for the searching lawyer who may find himself *in extremis* in his search for the law.

In a later paper we will make a more detailed survey of that unexplored domain of the law-book world, which may be properly called its *"Findability"*;

1. This article should be read in connection with a prior paper by the same author, "Legal Classification in America—1880 to 1940"; Am. Bar Assn. Jour., May, 1939.

laying down some of the necessary "benchmarks," and setting forth some of the more significant "field notes" which were an essential part of writing this one. In such a task as that immediately before us, it seems desirable to omit all introductory matter, and come at once to grips with our subject.

Just one word of caution: We must remember that we are here dealing with an incalculably complex subject—namely the Body of the Law of a great People; a subject as complex and baffling and as vast as human life itself. If we do that we will approach our immediate subject-matter with a proper perspective, and we will not be disillusioned or frustrated by incidental difficulties and rebuffs.

### Legal Classification Visualized

In order that we may understand the business of Legal Classification, and particularly the rules and principles which underlie the Formula-idea, it is desirable that we first set forth some practical explanation of what modern Legal Classification now means. We will, therefore, endeavor to give a graphic presentation of the so-called Standard Classification System, in an effort to *visualize* it to the reader.[2]

We have it on the highest authority that the best method of writing *about* the law, is to use concrete examples and illustrations, so far as may be done. Indeed that is often the best method, also, for setting forth and expounding the law itself, whether in a lawyer's brief or a judge's opinion. Bacon, who is without doubt our greatest authority on the art of logical writing, urges this method, and pursued it with great skill and success in his extensive writings on the law.[3]

### X-ray Picture of Classification System[4]

Since our entire theorem, and its plan of operation, are both based on the so-called Standard Classification System it seems desirable to portray the idea of that Scheme in the most graphic way possible. After much experimentation and cogitation, a symbol-design has been worked out, which it is believed, well illustrates both the Scheme and its plan of operation. It appears as a sort of frontis-piece to our paper. That design is not official, but represents merely the writer's ideas of what Legal Classification now means, and what it purports to do. It constitutes a sort of X-ray Picture of the Classification System as illustrated by the topic Wills. This chart, or sketch, has a wide use and meaning aside from this paper, since it visualizes, in a concise and orderly way, the entire field of our American jurisprudence; but it also lends itself readily to our present purposes.

### A Lawyer's Thread of Ariadne

Some general comment about this design, and therefore about the Scheme itself, will be helpful at this point. In the first place we have in this sketch a good example of what Bacon calls an *"Atlas or Pole for Men's Thoughts;"*[5] because it furnishes a core to

2. This Classification System has long dominated the law book world. It was developed from about 1880 to 1896, when it first appeared in its completed form in the Century Digest. It is now used throughout 1) The Reporter System, 2) The American Digest System, 3) Corpus Juris and Corpus Juris Secundum (in a slightly modified form), 4) The Topical Index Books of the Shepard Citator System, and 5) numerous other less comprehensive publications. Already more than 1,750,000 reported cases and more than 8 million "headnotes" have been classified under it.

3. Bacon gives a prescription for this type of writing which deserves to be here quoted. He says:

"The method of writing best suited to so varied and intricate a subject as the law is that by observation and discourse upon history and examples. For the knowledge which is newly drawn, and as it were under our eye, from particulars, best finds its way to particulars again. And doubtless it is much more conducive to practice, that the discourse should follow the example than that the example should follow the discourse." [Advancement of Learning, Creighton's Rev. Ed. p. 265.]

Justice Oliver Wendell Holmes has said the same thing in urging the "Case Method" as the best plan of teaching the law. He said:

"Does not a man remember concrete instances more vividly than general principles? And is not principle more exactly and intimately grasped as the unexpressed major premise of an example, which marks its extent and its limits, than it can be in any abstract form of words? To make a general principle worth anything you must give it body. Otherwise you will have nothing but a rag-bag full of general principles, a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Corregio's pictures." [Quoted by Prof. W. A. Keener, in address on the "Case System," Am. Bar Assn. Rep., 1894, p. 480.]

Indeed it was Holmes' unique capacity for using apt figures of speech and concrete examples that was one of the reasons which made his legal style so justly famous.

4. The American Digest Classification System, or as it is sometimes called, the Standard Classification System, is a unique and significant achievement in American jurisprudence. It is the first *comprehensive plan* of Legal Classification in our history to become generally adopted, and to produce the effect on our case-law which that implies. It thereby has become, in and of itself, a major factor in our American Legal System. Previously the great output of reported decisions, through the years and the ages, poured out and fell like an immense pyramid of sand; its form and shape and size largely left to the winds of time, and the juridical laws of gravity.

But during the last 40 years this Scheme has changed all that. All our American case-law from Colonial times has been "re-poured" according to this Plan. Our entire case-law has been given a frame-work to which it may cling, like the steel-work of a great skyscraper. You may object to its plan or criticise its architecture, but you cannot ignore it; you cannot help being impressed by its importance and its utility. And you cannot find another skyscraper on the legal horizon.

The Scheme has been over-praised (mispraised is a better word) by some who are closest to it; just as it has been over-criticised, sometimes by theorists and sometimes by interested objectors. The fact is that its great merits as a law finding device (as well as its minor defects) cannot be fully understood, or fairly appraised, by those without experience in the practice of the law. It is the tenants of a skyscraper who know it best, rather than the builder or the architect; and so it is the practicing lawyer, "in the field", who best can judge this Scheme, but only after he has given it sufficient study.

Here we have only time for two "expert witnesses." They are widely separated in time; and each comes with an authority that will be taken at par in the legal world. Thirty-five years ago the "Committee on Law Reporting and Digesting" of the American Bar Association gave this Scheme careful study, after it had been in use for some years. In its report the Committee said:

"We have been seeking especially to emphasize the importance of uniformity of plan in the arrangement of the Digests. The Association * * * has suggested that the reporters for the several states should follow, so far as practicable, the plan that has been made familiar to the Bar in the Reports and Digests which are made for all the states alike. * * * This plan is one that has commended itself to the profession as consistent in logical order and well adapted to practical purposes." [A.B.A. Rep. 1905, p. 460]. That Report, it is worth noting, was signed, among others by Roscoe Pound.

In 1938, Professor Frederick C. Hicks, of Yale Law School, author of the standard work, "Materials and Methods in Legal Research," and recognized authority in that field, gave an interesting talk to the New York County Bar Association. His subject was "The Technique of Legal Research," and in it he gave the following appraisal of this Plan:

"The Scheme for the American Digest System was as good as any one had worked out at the time it was adopted; and no one has worked out a better scheme that could be used in its place. Improvements could be made it is true, but I doubt if it would be worth while to make any extensive changes. Any new scheme would be equally wrong for some purposes." [Law Library Journal, Jan. 1938.]

5. Bacon was a strong believer in the graphic presentation of thought, wherever possible. He says:

"Men have a strong desire to retain within their minds an atlas, or pole, for their thoughts, in some measure to govern

which our otherwise floating and random ideas may cling. In the second place, we realize from this rather geometrical chart, that certain aspects of our jurisprudence can be portrayed in a scientific, or at least a mechanical fashion, and may thereby be more easily studied and analyzed. We see also from this design, that the law, which we have always considered as an abstract rather than a concrete thing, is not so impervious to scientific discussion and even scientific analysis, as has commonly been supposed. The question indeed arises why the law may not be studied and treated (in some of its aspects) in the same accurate and scientific way in which other sciences are studied.[6] Finally we begin to realize from this visual sketch, that it may be quite possible to work out a sort of "thread of Ariadne," (to use the well-known figure of speech in the above quotation from Root's address) which will help to lead us through the maze of Legal Classification.

### Precepts for Use of Classification System

As we cogitate over this design, and over the Scheme for Legal Classification which lies behind it, we realize that some explanation is necessary (in advance of our Formula) if the average lawyer, as distinguished from the expert in Classification, is to make this System work, in actual research. A set of rules, therefore, has been worked out with some care which sets forth some of the more fundamental principles which govern this System. For lack of space, we will state these rules in what may properly be called Precepts, rather than attempt a discursive explanation of the Scheme.[7]

1. All systems of classification, including this one, abhor *duplication*. The same head-note or principle of law (in a particular Title) appears in one place, and one place only. Any other rule would result in doubling, or at least largely increasing, the number of volumes in a Digest or Encyclopedia.

2. This rule against duplication (which seems not even appreciated by most lawyers) must be constantly kept in mind. An enormous amount of time is wasted by the average searching lawyer, in rather blindly roaming through these books in defiance of this rule against duplication. The lawyer, using books based on this Scheme, must determine in advance, the general *locus* of the point he seeks, and stick rigidly to that area.

3. The "Rule of Exclusions" (which will later be discussed) is probably the second greatest stumbling-block for the searching lawyer. That Rule means that certain parts of most large Titles (like *Contracts, Criminal Law, Executors and Administrators, Municipal Corporations,* and *Wills,* to name the major ones) have been arbitrarily excluded from their logical place for reasons of convenience and expedience, and placed under some more specific Title.

4. These "Exclusion Notes" are no longer printed in the books. They can only be found in the "Scope Note" at the beginning of each Title in the earlier Digests.[8]

5. The chief concern of the searching lawyer in using the Classification System is with the black-letter-lines, which occupy the outer circle of our design. These black-letter-lines correspond to the catch-lines which for centuries have appeared in statutes and such books as Blackstone's Commentaries, but under the Classification System their use becomes much more important than in the older books.

6. The Classification System becomes a "no-man's land" of the law, unless the searching lawyer stays rigidly between the *radii* of his subject, as indicated by the design, and as those radii are projected clear to the rim of the outer circle. If he does not find his point within those projected radii, then it has been classified to some other Title, and that Title must be located and searched.

7. The pews of churches often look much alike, and so do the black-letter-lines of the Classification System; but it is important to know what Church you are in, and the same is true of the Titles of this Scheme. Indeed, the same identical black-letter-line, as we have already noted, may be found repeated in many separate Titles of the law. These are generally different *applications* of the same rule or principle of law—which takes us back to a proposition we will often meet, namely: The same rule of law may have a myriad of applications. Each *application* becomes in effect a different rule or concept of law, so far as the Classification System is concerned.

8. The black-letter-line for each "section" must be read in connection with the wording of its Subdivision-head, and still further back with that of its Division-head. In the Classification System the "sections" are like the life boats of an ocean liner—useless, and lost on the open sea, if separated from the mother-ship. And the mother-ship of a black-letter-line is the Subject-heading, which has preceded it.

9. The business of classification is an "art" in itself. When the shells and bark and husks of the average "head-note" have been stripped away

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the fluctuations and revolutions of the understanding." [Advancement of Learning, p. 154.]

6. Wigmore, probably the greatest (as well as the most successful) protagonist of what he calls "Legal Science," has frequently urged this point. In the Preface to Vol. V of his work on Evidence, he says, among other things:

"One who has perused several thousand contemporary decisions cannot help forming some impressions of their juridical qualities. * * A first shortcoming to be noted is the lack of acquaintance with *legal science*. By *legal science* is meant all that is above, between and behind the particular rules and precedents,—the system of legal knowledge; that which distinguishes the architect from the carpenter. The lawyer's equipment as a scientist may be in general denoted by his attainments in (a) legal history, (b) legal philosophy and jurisprudence, (c) sound discrimination of the best sources of knowledge.

* * * Perhaps a main explanation for this shortcoming is the judges' *indifference to legal science*. This indifference they share with most of the profession."

7. Webster defines a *Precept* as "A commandment or order, intended as a rule of action."

8. These "Exclusion" notes were originally worked out with great care by the compilers of the Classification System, and were regarded as an essential feature of it. They were given due emphasis and were printed verbatim at the head of each Title of law, in the Century Digest and also in the First Decennial Digest, where they may still be found. But they were dropped out of the later Digests and have never appeared in the Corpus Juris publications. This seems a good deal like providing a road-map, from which certain areas have been arbitrarily excluded, without indicating the excluded areas.

The "Exclusion" note for the topic Wills (used to illustrate the design) reads as follows: "Excludes gifts in expectation of death (see 'gifts'; restrictions on creation of perpetuities or trusts for accumulations (see 'perpetuities'); appointments, rights, powers, duties and liabilities of executors, and of administrators with will annexed, etc. (see 'Executors and Administrators'); effect of intestacy (see 'Descent and Distribution'); and legacy and succession taxes (see 'Taxation')."

for classification purposes, the heart or kernel of the legal proposition which remains, often takes on a surprising classification. And it is the major premise of a legal proposition or "headnote" (that is the kernel of it, not its corollary clauses) which determines its place in the books.

10. It must be remembered that the *expert classifier*, who has spent years in the business, is generally a better judge of where a "head-note" should be classified than is the lawyer in the "field." In a difficult situation therefore the Classification System is likely to be right.[9]

11. Another significant point: There is a type of "overlapping" proposition or head-note, which almost defies true classification. Such a proposition is like a piece of changeable silk, which takes on a different color, depending on how the light may strike it. These propositions or headnotes cause great difficulty in classification—but they cannot be avoided. It is often this type of legal question which causes the most difficulty for the searching lawyer. For this type of question considerable familiarity with the Scheme of the Classification System is absolutely necessary. The *locus* in the System, of this type of question, cannot be found by any "natural," or "logical" process of reasoning.

12. In spite of his best efforts a searching lawyer may eventually get "lost" in such a Title as *Contracts* or *Wills* or *Municipal Corporations*. He is likely to discover that his "legal compass" (that is his sense of logic plus his knowledge of Classification) has pointed out an area in which he simply cannot find the elusive point for which he seeks. In that case it is useless to stumble through the legal wilderness which lies about him. It is the better part of valor to return to camp, so to speak, and reset his "compass."

Enough has been said to indicate some of the principles which must guide the searching lawyer in using this System. These Precepts could be extended but the major ones have been given; and an end must be made to this phase of our subject.

### The "Spectrum" of Legal Classification

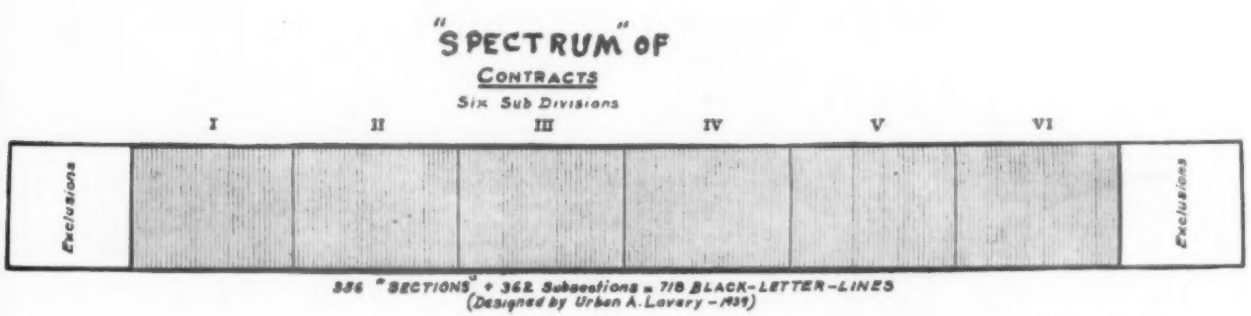
The chart or design already given has been aptly called an effort to set forth a sort of X-ray picture of the entire Classification System; and to illustrate how it appears in one important Title of the law, the topic Wills. It is possible, however, to present the Scheme in other graphic ways. And this should be done, within reason; because the point cannot be too much stressed, that such is the best means to get a clear and visual picture of the law itself, as it lies in the books, behind and beyond the Classification System. It is only when the lawyer is able to visualize this "map of the legal domain," as the Classification System has been aptly called, and to see it, so to speak from the heights, that he will come to understand its true purpose and meaning, and to appreciate its great utility as a law-finding device.

For this purpose another symbol or design, also borrowed from the physical world, lends itself to our use. It presents the Classification System in another graphic form, but from a different vantage point, and in an equally original manner. This chart or pattern of the law, which has been worked out by the writer, is a sort of *illuminated* picture of the Title *Contracts* (likewise one of the important topics of the law) as it appears in this Scheme. The idea for this design arises out of the close analogy of the Classification Scheme to the Spectrum of light.

When sunlight is passed through a prism of glass in a certain way it comes out in its seven primary colors, beginning with red and going through to violet. For purposes of utility and convenience each of the seven primary colors may be further refracted, and thus divided and subdivided into scores and even hundreds of different shades and tints.[10]

In its natural state the case-law may be compared to the natural state of light. The law is omni-present and self-executing like the light of day. It is not divided into "Titles," or classified into "sections"; the myriad applications of the rules and principles of the law exist independent of the idea of Classification. This has been well expressed by Maitland in his famous simile, by which he describes the law as a "seamless web." It is only when we begin to force the law into bound volumes and "package it," so to speak, and thus make it conform to a man-made Classification Scheme, that our trouble begins. It is then that the analogy to the Spectrum of Light becomes peculiarly helpful and striking.

When the case-law is passed through the "prism" of the Classification System, it first comes out in its seven primary "Categories,"[11] just as light is divided into its seven primary colors. Just as the seven primary colors for purposes of utility and convenience, have been divided into hundreds of distinct "colors," so the seven "Categories" of the law have been divided into 415 branches or Titles in the Classification Scheme, beginning with *Abandonment* and going through to *Workmen's Compensation*. In our present analogy the term "Spectrum" is best applied to one of these separate Titles or branches of law, rather than to the entire field of the law. When we diagram the "spectrum" of *Contracts*, for example, it comes out as follows:[12]



**Precepts for Classification of a Particular Title**

When we study this "spectrum" design and speculate on its possibilities as a "picture" of a particular title of law, a number of things become at once obvious, which would be hard to describe by discursive comment; and harder still to visualize and comprehend. Here again, largely to save time and space, we will resort to the use of Precepts, rather than enter into detailed explanations.

1. The *Title Contracts* as represented in the "Key Number" Digest System runs to about 1/100th part of our case law. Based on the accepted figure of 1,800,000 reported cases down to 1940, the body of Contract law, in our law-books would be represented by around 18,000 cases and perhaps 75,000 head-notes.[13]

2. The "Exclusion" note for the topic *Contracts* is particularly significant. It may be compared to a *"Stop* and *Go"* sign, to be observed before the topic is considered. This note is too long to quote, since even in fine print it occupies one full column, 10 inches long. It shows clearly how the law of *Contracts* is interwoven into more than a score of other Titles, like *Account Stated, Bonds, Champerty* and *Maintenance, Infants, Principal* and *Surety, Specific Performance,* etc. In other words, each of these Titles contains a segment of *Contract* law. In fact all "Exclusion" notes should be literally regarded as *"Stop* and *Go"* signals.

3. With 356 "Key number" sections, and 362 subsections, making 718 actual black-letter-lines, in the subject of *Contracts* alone, it is obvious that the searching lawyer must shave his legal shingle rather thin, if he is to find the crevice into which it fits. Or to bring the figure of speech in line with our "spectrum," he must become very alert to the different shades and tints of a legal question so that he may find the precise "section number," which should represent his point.[14]

4. One of the chief things disclosed by the "spectrum" is how the various "sections" blend imperceptibly into each other. It is obvious that a certain amount of over-lapping must result. The necessity for clear and sharp analysis, *in advance,* of the question to be located, could hardly be better indicated. The reason for reducing the question to its shortest form and least possible number of words —best done at first in long-hand—will also be apparent.

5. The "spectrum" and the prior design, both alike indicate clearly the reasons why the searching lawyer should reduce a difficult and baffling question to its rudimentary elements, and to its "lowest common denominator" in number of words. When that is done, the "catch-words" of the resulting proposition are likely to stick out like a sore thumb; and thereby the number of such "catch-words" to be kept in mind for comparison with the black-letter-lines of the Classification Scheme will be much reduced. The searching lawyer, in difficult cases, can cut away every corollary idea from his main proposition; a thing that the Digest editor or Text writer cannot ordinarily do. It is a rare question that cannot be reduced to 20 words and when that is done, daylight will often begin to appear.

6. The aim and purpose of the searching lawyer in trying to locate his question, in a difficult case, by means of the Classification System is well suggested by John Stuart Mill in his classic book on Logic. Mill has a chapter on "The Principles of a Philosophic Language" that is of great interest to the student of Legal Classification. He points out that every "proposition," whether in the field of general Logic, or even in the law, can be reduced to the simple form "Gold is yellow," or the negative form, "Silver is not yellow." It is really possible to make a practical application (within reasonable limits) of Mill's formula, in the analysis of every legal proposition. And when that is done, the "color" or "tint" of the proposition is just so much more easily identified with a particular section of the "spectrum."

9. Not only is this so, but generally, the lawyer who specializes in a particular branch of the law, like "Automobile" law, or "Insurance" law, etc., comes (subconsciously) to think that all principles of law which touch his special subject should be classified with it. That is the experience of all publishers. Complaints about classification are largely made up of such instances.

10. For an interesting presentation of the spectrum of light, and of the philosophy of color, see Webster's New International Dictionary, under that word. A chart is there given which sets out 152 distinct "Colors"; and, as indicated, these are only the most distinctive "colors." They can be further divided and classified into a myriad of different tints and hues.

11. The seven "Categories" or main divisions of the law are indicated on the design already described. The name "Category" in the original Greek "smelled of the law," because it meant originally a charge or accusation. When B. V. Abbott first originated the Classification System about 1880, he borrowed this term from Aristotle and applied it to legal classification. For further discussion of background and history of Classification System, see article cited in Note 1.

12. The title *Contracts* is suitable as an illustration for our "spectrum" device, for several reasons. In the first place it is, so to speak, one of the "clear cut" branches of substantive law. In the second place it is a typically substantial topic, which it should be for our present purposes. Finally it is well suited to our purposes because of its cohesive and logical arrangement as a unit subject of law.

13. The official estimate of the National Reporter Manual gives, down to 1936, around 1,750,000 reported cases and about 7,000,000 headnotes. On this point of size some further figures may be of interest. In the 4th Decennial Digest (1926-36) there are 32 volumes with about 58,000 pages. The topic *Contracts* covers 580 pages, which gives the above ratio of 1/100th. By way of comparison, it may be of interest to state that *Appeal* and *Error* covers 3,300 pages, or 1/17th of that entire compilation; and *Wills,* another illustrative topic, covers 960 pages or 1/60th of it.

It is interesting to note that the relative "space" occupied by *Contracts* seems to be growing less. In the Century Digest, *Contracts* occupied practically one entire volume out of 50. The causes for this apparent shift in space requirements furnish interesting grounds for speculation.

14. Even a cursory examination of the Classification Scheme at the head of any main title of law, in the Digests (and also in Corpus Juris) will disclose that there are a very large number of "sub-sections," which themselves carry no section number; and yet they each carry a black-letter-line, in the same sense as the "section" under which they are placed. The only practical result is that the total of the *numbered* "sections," under any given Title of law, ceases to have any significance. For example, the "Key-Number" Scheme for *Contracts* shows it has 356 numbered "sections"; but an actual count shows there are 362 "sub-sections," each with a black-letter-line. In other words the topic *Contracts* in the "Key-Number" Digest books actually contains 718 "sections."

The same thing is true of the other large topics of law. Thus *"Appeal and Error,"* under the "Key-Number" Scheme is listed as having 1247 "sections"; while it has in addition, 1411 "sub-sections," or a total of 2568 *actual* sections. *Wills* is shown under the "Key-Number" plan to have 872 "sections"; but it has 486 "sub-sections" or a total of 1358 *actual* sections.

This point is not made in any sense of criticism. It makes little difference to the profession or any one else, whether the idea of sub-sections is used. We are only concerned here with pointing out how complicated and extensive these large Titles get to be in our modern comprehensive law-books.

7. The blank spaces at either end of the "spectrum" represent those parts of the law of *Contracts* which have been "excluded" from that general topic and are treated under more specific Titles, like *Usury, Party Walls, Landlord and Tenant, Bailments, Release,* etc. When we consider that each of these special topics (and many others) are really a part of the general law of *Contracts,* we begin to realize why it is difficult to determine just where a given question of law may have been classified, in the 415 Titles of the Scheme.

8. The blank spaces in the "spectrum" also show clearly why it is necessary, *in advance,* to read and study the "Exclusion Notes," particularly in such a general topic as *Contracts.* Otherwise the searcher may be looking in the law of *Contracts* for a point that is to be found in *Bailments,* or *Landlord and Tenant,* etc.

9. As we study this "spectrum" and consider the 718 separate black-letter-lines in the topic *Contracts,* we get some insight into the need for a Standard Legal Nomenclature; that is, a set of black-letter-lines, as the names for legal concepts, which would be universally accepted by all publishers. Even more clearly we see the need, on the part of the searching lawyer, that he become "Nomenclature-minded."

10. Indeed it may be laid down as a maxim, that: "He who has a working knowledge of the Art of Legal Nomenclature has more than a headstart in the race for finding the law." [15]

11. Perhaps the outstanding lesson of the "spectrum" is that a big topic like *Contracts,* covering hundreds of pages in our modern Digest or Encyclopedias, becomes itself a sort of mirror-maze. In it the searching lawyer sometimes comes to see his question (or fragments of it) duplicated and multiplied, in the hundreds of black-letter-lines, until he becomes confused and baffled.[16]

12. There is simply only one way, in these big topics, for the searching lawyer to keep his sense of logical arrangement and his sense of "location" from being overwhelmed; and that is by acquiring a working understanding of the Classification System.

Here again we might carry on our *Precepts* about the "spectrum" at length. But enough has been said to suggest its value in portraying the Classification idea. If the great utility of the Classification Scheme, as a modern law-finding device, has been indicated by our Precepts they will have served their purpose.

### New Technique Needed

A point to be stressed in legal research, whether old or new, is that the rare and difficult question of law is always the hardest to find. A "graph" in that field of the law would show that the "curve" of *skill plus labor* rises and falls in direct ratio to *difficulty plus importance.*

The case-law may be compared to a vast iceberg floating in the ocean, except that the situation, so far as submersion is concerned, is reversed. Seven-eighths of the law's bulk is undisputed and obvious. It is the "submerged" part which causes all the law-suits and stumps the searching lawyer. Here is what may be called the "zone of difficulty" in all law-finding. It is in this "submerged" area, that the profession, both the Bench and the Bar, must acquire a new technique in the use of our modern law-books.

When we stop to think of it, it is hard to believe there is any legal question that could possibly arise, that has not been passed upon, at least by analogy, in the nearly two million reported decisions in our books. But where is the case? Like Hamlet's soliloquy: "That is the question."

It is estimated that 75 per cent of the text in our comprehensive law-books is taken up with general principles which have long been generally accepted.[17] Such principles are never called in question, whether by the client, the Bench or the Bar. And yet our law-books, like our judges' opinions, are over-filled with iterations and reiterations of just such primer-rules of law. With such things we, in this paper, have little to do.

It is with the "submerged" area of the law that we are here concerned. In that field some method corresponding to "triangulation" in surveying, is often necessary, to project known legal principles into an unexplored legal area. Such a process requires a talent that goes with the highest type of legal advocacy. Here is the primary place where the "new technique" can be of help. It is also often necessary, in searching for some rare and obscure point of law in our comprehensive law-books, to use a method corresponding to what is called "bracketing" in artillery firing. In this way, by shooting, first beyond the unseen target, and next this side of it, we finally register a legal "hit." Here is the second principal place where the "new technique" proves its utility. It helps to *find* the law.

It is very largely by actual experience, by a constant method of trial-and-error, that an acute lawyer acquires skill in these fields. Experience and perseverance form the infantry and the artillery in this phase of the lawyer's war.

The Formula which follows has been drawn with these things particularly in mind. It is especially designed to locate and solve (so far as may be) the subtle and difficult problems of law, and the critical and elusive cases, that have a way of resisting the searching lawyer.

### The Shoes of the Classifier

Another thing must be remembered. Many of the problems and difficulties we are here discussing are

15. The subject of Legal Nomenclature may be called the *New World* of modern jurisprudence. It is a field in which the achievements of other sciences like Botany, Zoology, and even Medicine, have far out-stripped the Law. Specifically, Legal Nomenclature is that part of Legal Terminology which is specially set apart and used as the system of names for legal concepts, in a Classification Scheme. The uses and purposes of a Legal Nomenclature can only be hinted at in this paper. Books have been written on that topic in Botany, Library Classification, etc. For a recent and good example of a complete *Legal Nomenclature,* worked out however for classification purposes for a Law School Law-Library, rather than for a Comprehensive Digest or Encyclopedia, see "SUBJECT HEADINGS IN AMERICAN AND ENGLISH LAW," published (1939) by Columbia University.

16. In such a title as *Contracts,* or *Wills,* or *Evidence,* and particularly in *Appeal and Error,* and *Criminal Law,* one is reminded of a large restaurant, decorated in the "modern" style; where the side-walls and ceiling being made wholly of mirrors, the people and tables and chairs are seen over and over again, until the eye has difficulty in detecting where reality leaves off and its images begin. We can see now that such comprehensive Titles were mistakes. But hind-sight is a marvelous thing!

17. Wigmore, in the preface to his treatise on Evidence says: "Too much of our law is dead bark, dead bark on the outside of the tree, in contrast to the living growing inner core. At least in judicial opinions. Two-thirds or more of them are needless—dry repetitions of well-settled things."

just the ones that baffle the expert Classifier and the acute lawyer alike. There is this difference, however; the Classifier and the lawyer are on opposite sides of the fence in the law-book domain. One is engaged in stowing the legal propositions away in the books and the other must find the place where they have been stowed. Is it not natural to expect that the searching lawyer will find his way easier if he understands the methods which have guided the Classifier? In this field, as in physics, the same law holds: The angle of reflection is equal to the angle of incidence. If the searching lawyer, from his position in the "field," looks back along an angle which the Classification Scheme will reflect to the "stance" of the expert Classifier, he can step into his shoes. And stepping into the shoes of the Classifier is the answer to nearly every difficult question of law, so far as our modern law books are concerned.

But there are two considerations to be kept in mind: The inherent difficulties are numerous and challenging; and human nature, as represented by Classifiers and searching lawyers alike, is a variable quantity. If these two points are remembered perseverance will be more tolerable and final success more certain.

### An Analogy

When the searching lawyer has once really gotten this Classification System into his mind in working fashion he will find himself thinking of an analogy in the business world. He will think of the System as a large "Business-machine" device, hitched to the vast filing cabinet of the law. Here are to be found all the concepts and principles in the great storehouse of our case-law, represented by nearly two million reported cases. When a particular push-button of the machine is touched, there come out all the cards (or judicial decisions) concerning a given point of law. The "machine" of the Classification System has around 77,000 push-buttons, one for each of the black-letter-lines in the Key-Number System. The idea need only be suggested to indicate, at once, the necessity of becoming familiar with the key-board of the push-buttons, in order to get the right result.

### The Lawyer "In Extremis"

We will conclude this part of our comment by a suggestion which will probably sound familiar to many members of the bar. Many a lawyer (like the writer himself) has sometimes been baffled and disheartened, in the search for some critical and important point of law, when using the comprehensive Digests or Encyclopedias of which we have been speaking. Perhaps the lawyer remembers reading, in the "Advance Sheets" or in the Reports themselves, a similar case and accordingly is sure that his point is covered, if he could but find it. But alas, after the utmost labor and his best skill in analysis and research, he fails in the hunt. For him the case has been buried in the Potter's Field of Legal Classification, and is lost beyond recall.

Such an experience may not be frequent, but there are reasons for believing it happens to many good lawyers. As already suggested, the lawyer is often *in extremis*, because of his inability to find some acute and pressing question of law. Does the fault lie with the lawyer and his lack of skill in using the books? Of does it lie with the publisher in faulty classification? No, the fault generally does not lie with either of them. It is due as, we have before suggested, much more to the infinite variety of human activities, and let us say, human frailties. The first law in using the Classification System is: Persistence wins!

### Theorem For Law Finding

Our attempt to give a *Formula for Law Finding* is based on a theorem as to our jurisprudence which may be stated as follows:

I. A comparatively few fundamental principles really underlie the philosophy of legal research in spite of the great variety of their applications.

II. For our present purposes it is possible to formulate and state these principles in tabular form; and after they have been stated it is possible to make them work; particularly in our Comprehensive Digests and Encyclopedias.

It is significant that this theorem for law-finding finds a closely cognate idea in the body of the law itself; namely that our case-law is governed by a similar theorem. Thus Professor Holland in the first sentence of his justly renowned work, "Elements of Jurisprudence," says:

"The present treatise is an attempt to set forth and explain *those comparatively few and simple ideas* which underlie the infinite variety of legal rules."

Professor Langdell in the Introduction to his equally famous "Cases on Contracts" says the same thing in these words:

*"The number of fundamental legal doctrines is much less than is commonly supposed;* the many different guises in which the same doctrine is constantly making its appearance, being the cause of such misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their numbers."[18]

### A "Linnaean Key" for the Law

It is not suggested that anything so perfect, for example, as the "Linnaean Key" for Botany can be devised for the law. One may take a flower and pick it to pieces, bit by bit; and that cannot be done, *quite the same way*, in the law. But there is, as we have suggested, a way of doing a similar thing with most difficult legal questions. A few experts in the law publishing world who have spent years in the business of legal analysis and classification, and a few lawyers who have given the matter careful study, have acquired an extraordinary skill in this regard. Some few scholars of the law, like the late Professor Hoefeld, and in a different way, Dean Wigmore and Dean Pound, have pointed to the possibility of a *scientific* and *analytic* method, to determine the fundamental concepts of our jurisprudence.[19] The fact is that it is possible for an acute legal mind, which has been particularly trained for the work, to smelt down and reduce, in the crucible of keen analysis, a piece of legal rock, so that what may be called its "chemical elements" stand out. When this is done the problem of "findability," so far as those elements are concerned is very much reduced.

Hence it may be stated, that in spite of the difficulties which lie in the way, it is entirely possible that some sort of "Linnaean Key" for the law will some day be devised. If it is, the lawyer who conceives it

18. Bacon hints at the same idea when he says: "Let not the *placets* of the law be taken for rules as they usually are, very injudiciously; for if this were received, there would be as many rules as there are laws." Advancement of Learning, p. 293.

19. See note 6.

and perfects it, will find that his name will be called forever blessed.

## TABLE OF RULES FOR FORMULA

And now, having done the best we can to lay a foundation for our Formula, we submit its rules as follows:

### Major Rules

I. **Reduce each question for which authority is sought to a single proposition; that is to a single legal concept. For this purpose the searcher should ruthlessly split off from the main proposition, every possible corollary.**

II. **Locate the Title of law to which the proposition logically belongs. This, next to Rule I, is of first importance.**

III. **Examine the "Exclusions" note for that Title as it appears in the classification scheme. If the branch or division of law covering the proposition has been excluded from the general Title, and placed under some more concrete Title it must be there sought.**

IV. **When the Title which includes the proposition has been accurately located, then locate the proper division and sub-division which covers the proposition. For this purpose note accurately the internal arrangement of the Title; that is, the way it has been divided and subdivided.**

V. **Finally, locate the particular black-letter-line (or section number) which is the next-of-kin to the proposition in question. This may be difficult and should be done with great care. Here the authorities should be found—unless there are none.**

### Minor Rules

I. **Be sure always to read the black-letter-line (or section line) in connection with the headings of the sub-division and division which have preceded it, since they are all a part of the guide-post leading to the right location. If this is not done there will be confusion; since otherwise identical black-letter-lines will be found in the same title. Such duplication is something sound classification does not permit.**

II. **Under that black-letter-line there should be found all the cases involving that proposition. Do not look at random elsewhere for them. To repeat: Like concepts of law are found only in one place, and are never duplicated in some other place.**

III. **If there is any difficulty in finding the point, then as a matter of precaution, check back through V, IV, III, and II of the major rules, in reverse order, to see that the "chain of title" is direct and continuous. If there is still trouble, then the searcher is not under the correct title, or correct division of it; and he should start over again, or search some other compilation.**

VALEAT QUANTUM VALERE POTEST.

## ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

*Headquarters—Bellevue-Stratford Hotel*

Hotel accommodations, all with bath, are available as follows:

| | Single for 1 person | Double (Dbl. bed) 2 persons | Twin beds for 2 persons | Parlor suites (2 rooms for 1 or 2 pers.) |
|---|---|---|---|---|
| Adelphia (13th & Chestnut) | $3.50–5.00 | $5.00–6.00 | $6.00– 8.00 | $12.00–25.00 |
| Barclay (18th & Rittenhouse Sq. E.) | | 6.00 | 7.00–10.00 | 12.00–18.00 |
| Bellevue-Stratford (Broad & Walnut) | 3.50–5.00 | 5.00–7.00 | 6.00– 8.00 | 12.00–15.00 |
| Benjamin Franklin (9th & Chestnut) | 3.50–5.00 | 5.00–6.00 | 6.00– 8.00 | 12.00–14.00 |
| Drake (1512 Spruce St.) | 3.50 | 5.50 | 6.00 | 10.00 |
| Essex (13th & Filbert) | 3.00–3.50 | 5.00–6.00 | 7.00 | |
| McAlpin (19th & Chestnut) | 2.25–2.75 | 4.00 | 4.50– 5.00 | |
| Majestic (Broad & Girard) | 2.50–3.00 | 4.00–5.00 | 5.00 | 8.00–12.00 |
| Philadelphian (39th & Chestnut) | 3.00–4.00 | 5.00–5.50 | 6.00– 8.00 | 9.00–20.00 |
| Ritz-Carlton (Broad & Walnut) | 4.00–5.00 | | 7.00– 8.00 | 10.00–12.00 |
| St. James (13th & Walnut) | 3.00 | | 5.00– 6.00 | |
| Stephen Girard (2027 Chestnut St.) | 2.75–3.25 | 4.50–5.50 | 5.50 | |
| Sylvania (13th & Locust) | 3.00 | 6.00 | 6.00 | 10.00–12.00 |
| Walton (Broad & Locust) | 2.50–4.00 | 4.00–5.00 | 5.00– 6.00 | 8.00–12.00 |
| Warburton (20th & Sansom) | 3.00 | | 5.00 | |
| Warwick (17th & Locust) | 4.50–5.50 | | 7.00– 8.00 | 12.00–14.50 |
| Wellington (19th & Walnut) | 4.00 | | 6.00 | 8.00 |

### EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

# WAR AND THE ADMINISTRATION OF JUSTICE

War Is One Method of Settling Disputes and Lawyers and Judges Operate Another Method Which Has Developed Since the Emergence of Man from Barbarism—This is the Substitution of the Administration of Justice for Combats and Wars—The Two Subjects Are More Closely Related Than at First Appears—How American Lawyers and Judges Can Make Their Greatest Contribution to the Cause of Peace, etc.*

By Hon. Charles A. Beardsley
*President of the American Bar Association*

FOR the past two months, a major war has been going on on the other side of the Atlantic. And, for the past two years and four months, something that strongly resembles a major war has been going on on the other side of the Pacific.

In the tense atmosphere created by these conflicts, American lawyers and judges have come together in this annual meeting of the North Carolina State Bar, to confer in reference to the problems that primarily concern the American legal profession—to confer in reference to the problems that relate to the service rendered by American lawyers and judges to the American people, which service we call "the administration of justice."

My subject today is "War and the Administration of Justice." This subject embraces two things that, at first blush, may appear to be wholly unrelated. Obviously, the one bears no resemblance to the other. And yet it seems to me that these two unlike things have enough in common to justify us in considering them together.

For the purposes of our discussion, I shall make no distinction between the war on the other side of the Atlantic, and the other thing on the other side of the Pacific, which other thing strongly resembles a war, although the experts have not as yet concluded that it is a war.

Someone has defined an "expert" as "a person who crawls slowly and laboriously toward the same goal that we common folk reach in one heedless jump, and, when he arrives, isn't sure he's there." Since I shall make no distinction between this thing on the other side of the Pacific, and this thing on the other side of the Atlantic, I shall not speak as an "expert," but merely as one of the "common folk."

I shall endeavor to discuss this subject, of war and the administration of justice, calmly and objectively. I shall refrain from oratory, since I am inclined to believe that oratory is rarely, if ever, an aid to clear thinking. I have in mind the colored boy's explanation of the meaning of "oratory":

"I explains it dis wise: Ifen I say dat black is white, why dat's plain foolish. But, ifen I say dat black is white, and bellows like a bull, and pounds de table with both my fists, why, den dat's oratory."

I shall endeavor to refrain from being dogmatic—I shall try merely to suggest some lines of thought, instead of undertaking to be positive about these lines of thought—having in mind Ambrose Bierce's definition of "positive." "'Positive,'", he wrote, "means being mistaken at the top of one's voice."

What is the relation between war and the administration of justice—between war and the service rendered to the public by lawyers and judges?

War is one method of settling disputes. And the lawyers and the judges operate another method of settling disputes—they operate a substitute for combats, for fights and for wars.

Men always have had disputes; and, until the millennium, men will continue to have disputes.

One way of settling these disputes is by combat, victory going to the stronger, or to the more unscrupulous, of the disputing parties, regardless of the justice of his cause. When only two men, or only small groups of men, engage in the combat, they call it a fight. When large groups of men engage in the combat, they call it a war.

When men were emerging from barbarism, they devised a substitute method of settling disputes, between two men, or between two groups of men. They devised a substitute for combats, for fights and for wars, which substitute was calculated to bring victory to the party to the dispute who had the most justice on his side, regardless of the relative strength of the parties. And they called this substitute "the administration of justice."

As a guide to be used in the settlement of disputes, by the use of the administration of justice, men made laws.

And, in order to add to the effectiveness of the administration of justice, they chose learned men to act as judges, to interpret and to apply the laws, and to decide between the parties, according to law and according to justice. And, in order still further to improve the administration of justice, they caused other men to become learned in the law, and to acquire proficiency in determining what was just as between man and man, to the end that these other learned men might champion the causes of the respective parties to the dispute, and assist the judges in interpreting and applying the law, and in determining what was justice. And they called these other learned men "lawyers."

And they called the places, where the judges and the lawyers administered justice, their "temples of justice;" and they called the judges and the lawyers "ministers in the temples of justice"—probably because they associated these learned men, and the service that they rendered—this substitute for combats, for fights and for wars—with their religious teachings and ceremonies.

*Address delivered at the meeting of the North Carolina State Bar at Raleigh, Oct. 27, 1939.

And, in the course of time, there came to all thoughtful men the realization that the preservation of the integrity of their temples of justice, and the maintenance of the integrity and independence of their legal profession, are essential to the existence of a free people—essential to the continued operation of this substitute for combats, for fights and for wars—essential in fact to the continuance of the substitute that man had devised for barbarism, which substitute man calls "civilization."

When, a century and a half ago, the representatives of the Colony of North Carolina met in Philadelphia, with the representatives of the other American Colonies, and framed the Constitution of the United States, they recited in the Preamble the purposes to attain which the Constitution was to be ordained and established. And, in this recital, the purpose, to "establish justice," is second only to the purpose "to form a more perfect union."

An outstanding American lawyer and statesman of his time, Daniel Webster, reminded the American people that justice is "the ligament that holds civilized beings together," and "the greatest interest of man on earth." And he might well have added that the kind of justice, to establish which the Constitution was ordained and established—the kind of justice that is rendered to the American people by American lawyers and judges, in the American temples of justice—is a substantial part of the substitute provided by civilized man for combats, for fights and for wars, and a substantial part of the foundation for civilization, in this part of the present-day world.

Although the administration of justice is civilized man's substitute for combats, for fights and for wars, civilized man still is required to use force, and will continue to be required to use force, as long as there are a lot of people in the world who do not voluntarily obey the laws that govern civilized society, and as long as there are a lot of people in the world who do not voluntarily submit their disputes for decision by the administration of justice, or who do not voluntarily comply with decrees rendered in the temples of justice.

Thus, it is frequently necessary to use force to make effective the decrees rendered in the temples of justice—to take from the losing party the property or the money that justice requires him to surrender or to pay, or to deprive him of his liberty for a time or for all time, and sometimes to deprive him even of his life.

Furthermore, it is necessary to use such force, as is represented by our police in every city, to capture and to subdue the lawless, and to bring them to the bars of justice.

And civilized man has not as yet been able to devise any means of compelling large and powerful groups of men, banded together in sovereign nations, to submit their disputes for decision by the administration of justice. Sometimes, they do so. Sometimes they voluntarily submit their disputes to international courts of justice, or to international arbitration. And sometimes they are willing to confer, calmly and dispassionately, and to settle their disputes by the conference method—to settle their disputes, and have them settled, according to the demands of justice, as conceived by civilized and righteous men.

But sometimes these large and powerful groups of men, joined together in sovereign nations, are unwilling to do any of these things. They refuse to use any part of civilized man's substitute for war. They insist upon trying to settle their disputes by the use of armed force—by a method that is calculated to bring victory to the strongest, or to the most unscrupulous, wholly regardless of justice.

Although the nations of the world have had a lot of experience with war, some of them have failed to learn, in the school of experience, either that war does not pay, or that civilized man's substitute for war is a far better method of settling disputes. It is still uncertain as to whether the nations of this world will ever receive sheepskins in this school of experience, or whether they will forever insist upon taking the course that merely results in having theirs removed.

We still have war with us, in spite of all that man has learned in the school of experience, and in spite of all that civilized man has been able to do in the way of providing a workable substitute.

Large and powerful nations are today engaged in war, on the other side of the Atlantic. And large and powerful nations are engaged in something strongly resembling war, on the other side of the Pacific. In these two conflicts, a substantial part of what we like to think of as the civilized world is engaged in endeavors to settle disputes, by the use of a method that is calculated to bring victory to the strongest, or to the most unscrupulous, regardless of justice.

What should civilized nations—nations comprised of men who are desirous of avoiding war—men who are willing to use civilized man's substitute for war, as a means of settling all disputes—do when confronted by this kind of thing that is going on on the other side of the Atlantic, and on the other side of the Pacific?

Obviously, those nations that are attacked by other nations who thus choose to resort to war, must oppose force with force. The moral issues involved, in the use of such force, are not unlike the moral issues involved in the use of force in self-defense by civilized individuals singly, or by organized society, with its police force in every city.

The issue, presented to civilized nations that are not directly attacked by those nations that choose thus to resort to war, instead of using civilized man's substitute for war, is not so easily resolved.

The men of such nations, that are not directly attacked, usually talk a lot about the moral issues involved in the other nations' wars; and sometimes they allow their emotions to govern their actions.

But, ordinarily, they act according to what they conceive to be their own self-interest. They weigh the effect upon themselves of victory by each of the contending nations. They weigh the chances of victory with and without their participation. And, frankness compels us to admit that sometimes the decision as to participation or non-participation is dependent upon their estimates as to how easily they could overcome the nation that they wish to have overcome. If they think it will be easy to win, they are inclined to go into the war. If they think that success is doubtful, or that it will be difficult to succeed, they are inclined to control their emotions, and to stay out of the war, regardless of the moral issues involved. In this respect, the attitude of the men of civilized nations is not unlike the attitude expressed in the verse:

"When I was young and had no sense,
I very quickly took offense.
Now, I'm older and more wise,
I just get mad at little guys."

I do not wish to be understood as deprecating this attitude. It is not an attitude of which man can be particularly proud; but it is an aid to self-preserva-

tion. Perhaps we should go so far as to say that it is essential to self-preservation.

When a nation is faced with such an issue, it is necessary to think calmly and objectively. I recall years ago hearing a United States District judge refer to the desirability of being able "to think without perspiring." In a world in which large and powerful nations are engaged in war, the men of any nation that is not engaged in the war, and that might conceivably become involved in the war, need to acquire, and to use to the utmost, a capacity to think "without perspiring," constantly bearing in mind their obligations to themselves, and to future generations of their own people.

While we still live in a world, and in an age, in which experience has not taught all nations that civilized man's substitute for war is to be preferred to the original article—in a world and in an age in which experience has not been such a good teacher of this lesson that she has found any apples on her desk, still experience has taught men to do away with some of the severities of war. Thus, the laws of war, of thirty-four centuries ago, given by Moses to the Israelites, and reported in the 20th chapter of Deuteronomy, make even the atrocity pictures and stories of the present day appear humane.

Moses divided the potential enemies of the Israelites into two classes, first, the cities "which are very far off from thee," and second, the nearby cities.

As to a city of the first class, he prescribed:

"And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword;

"But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself" . . .

The less favored nations were the nearby cities. For these nearby neighbors of the Israelites, Moses prescribed the following treatment in war:

. . . "thou shalt save alive nothing that breatheth;

"But thou shalt utterly destroy them, namely, the Hittites, and the Amorites, the Canaanites, and the Perizzites, the Hivites, and the Jebusites; as the Lord thy God hath commanded thee."

In present-day discussions of treaties, we sometimes hear mention made of "the most favored nations clause." In these laws of war as enacted by Moses, the part applicable to cities "which are very far off from thee" was "the most favored nation clause" of thirty-four centuries ago. And the part applicable to the nearby neighbors of the Israelites is the original version of "the good neighbor policy."

The people of peace-loving nations of the 20th century do not want even the greatly improved kind of war that is going on today on the other side of the Atlantic, or on the other side of the Pacific. But what can they do to guarantee that they will not experience the 20th century kind of war? What can the United States of America do about it? What can you and I—the lawyers and judges of the United States of America—do about it?

Obviously, there is not very much that any or all of us, who are here today, can do about it. And, yet, there are a lot of things that mankind can do about it. And you and I are a part of mankind. And the immensity of the task should not deter any of us from doing all that we can about it, insignificant though our possible contribution may appear to be. If the people of this world are to be led to abstain from war, and instead to use civilized man's substitute for war, all of the right-thinking people of the world must do all that they can to that end. And that includes you and me. That end will not be attained if all of us—or if a substantial part of us—adhere to the attitude expressed in the verse:

"I know of things, not just a few,
But, ah! so very many of them,
That someone really ought to do;
And I'm not doing any of them."

One thing that we—the American lawyers and judges—can do about it is to exert ourselves to the utmost, to improve, to make more workable, and to make more attractive to the American people, this thing that we call "the administration of justice"—this thing that civilized man has devised as a substitute for combats, for fights and for wars—this thing that is but another name for the services rendered to the American people, by lawyers and by judges, in the courts and in their offices. We can do much to improve the administration of justice, and we can make it more workable and attractive, to the end that we may thereby help to induce the American people to use it, at all times, and on all occasions, as a substitute for combats, for fights and for wars.

But, if a really good job of improving the administration of justice is to be done, you and I need a powerful ally—we need to negotiate a mutual assistance pact with the rest of the American people. We shall have to point out to the American people, and we shall have to try very hard to make them understand, that the responsibility for improving the administration of justice rests, not on the lawyers and the judges alone, but on all of the American people.

It is a popular American pastime to blame the lawyers and the judges, and the bar associations, and the State Bars, for any and all defects in the administration of justice. This public attitude is frequently publicized in magazine articles and in newspaper editorials, on street corners, on lecture platforms, and over the radio.

The only way to improve the administration of justice is to improve either the lawyers and the judges, or the laws and rules of procedure. The lawyers and the judges are the workmen; the laws and rules of procedure are the tools that the workmen must use in operating the administration of justice. The people elect or appoint the judges. The people, through the Congress and the State Legislatures, make nearly all of the tools. And the people, through the Congress and the State Legislatures, fix nearly all the educational and moral qualifications for the workmen.

Furthermore, the American lawyers and judges, through the organized American legal profession — through the local Bar Associations, the State Bars and the State Bar Associations, and the American Bar Association, have been devoting their time and their energy for many years devising and drafting needed legislation, and pleading with the Congress and with the state legislatures to enact needed legislation—legislation that is necessary in order to improve the administration of justice—to improve both the tools and the workmen. Some progress in legislation has been made as a result of the advocacy of the American lawyers and judges. But the Congress and the State Legislatures, and the American people through their Congress and their State Legislatures, are still far behind the American lawyers and judges, in their support of those laws that are calculated to remove the defects from the ad-

ministration of justice, and to give to the American people the best possible legal service.

One reason why the legislatures are so backward about establishing adequate educational standards for admission to the bar is that there are so many legislators who like to dwell upon the fact that, although Abraham Lincoln had no formal education, he was an exceptionally good lawyer, and who apparently think that Abraham Lincoln is still living, that he might want to practice law in their particular State, and that he might not be able to gain admission if adequate educational standards were adopted by their legislature. Probably, if the truth were known, it would turn out that occasionally one of these legislators thinks that he himself is another Abraham Lincoln, who ought to be allowed to practice law, and who could not gain admission if admission requirements were raised. Commenting on the attitude of certain American legislators, toward standards for admission to the bar, the Fort Worth Telegram observed editorially:

"A lot of people seem to think that a man will make just as good a lawyer without an education; but even a jackass, to be of any use in the world, must be trained."

Yes, if the American people are to have the best possible administration of justice — the best possible substitute for combats, for fights and for wars, you and I—the American lawyers and judges—have our work cut out for us.

We must avail ourselves of every opportunity to bring home to the American people the realization that they are wasting their time, when they engage in the pastime of blaming the lawyers and the judges and the bar associations, because of conditions that are the necessary result, either of laws that the Congress or the State Legislatures have passed, or of the failure of the Congress or the State Legislatures to pass other laws that are calculated to bring about the needed improvements in the administration of justice—the needed improvement in the workmen and the needed improvement in the tools that the workmen must use.

We must bring home to the American people the realization that the way for them to get the desired results is for them to stop blaming the lawyers and the judges and the bar associations, and to start giving their attention to those who elect or appoint the judges, to those who pass the laws prescribing the tools that the lawyers and the judges are required to use, to those who pass the laws fixing the standards for admission to practice law, to those who have the power to enact new laws, that are endorsed by the bar associations, and that are calculated, if enacted, to give to the American people better rules of procedure, better judges, better lawyers, and better legal services.

In addition to removing these misconceptions as to where rests the responsibility, and as to who has the power, to improve the administration of justice, and, in addition to arousing the American people to see to it that better judges are elected and appointed, and that the Congress and the State Legislatures enact the legislation that will bring about the needed improvements in the administration of justice, you and I—individually and in our organized American legal profession—can awaken and keep alive, in the hearts and minds of the American people, a wholesome and intelligent respect and regard for their temples of justice, for the kind of justice to establish which the Constitution was ordained and established, for the kind of justice that Webster called "the ligament that holds civilized beings together" and "the greatest interest of man on earth," for the kind of justice that civilized man has devised as a substitute for combats, for fights and for wars—as a substitute for the kind of thing that is going on today on the other side of the Atlantic, and on the other side of the Pacific.

Thus, you and I — the American lawyers and judges — can make our greatest contribution to the cause of peace, our greatest contribution to the well-being of the American people, yes, our greatest contribution to the well-being of the present-day world.

When I suggest that we should diligently and eternally strive to make, and to lead the American people to make, the administration of justice so workable and so attractive that men will choose to use it as the method of settling all disputes, in preference to combats, to fights and to wars, does any American lawyer or judge complain that I am asking him to aim too high—that the result that I suggest is unattainable? If there are any such, to him I can only reply, in the words of the Grecian philosopher, Longinius:

"In great attempts it is glorious even to fail," and in the words of the American clergyman, Theodore Munger:

"Providence has nothing good or high in store for one who does not resolutely aim at something high or good.—A purpose is the eternal condition of success."

GEORGE E. BEERS
*Chairman, Section of Real Property, Probate and Trust Law*

# ADMINISTRATIVE AGENCIES AS LEGISLATORS AND JUDGES

The Administrative Process Is an Essential Part of Our Legal System—It Must Be Used Both in Legislation and in Adjudication, and in Some Cases Requires the Union of the Functions of Legislator, Prosecutor and Judge in the Same Administrative Agency—Efficient Administrative Exercise of These Functions May Be Obtained and the Individual Adequately Protected by Proper Coordination of Three Departments of Government and without Violating Principle of Separation of Powers

By Walter F. Dodd
*Member of the Chicago Bar*

WHETHER we agree or not with the propriety of the development, it is true that governmental regulation has intervened in the efforts to solve the social and economic problems of modern society. And such intervention will increase rather than decrease. The regulation of social and industrial relations is not new,[1] but such regulation becomes more complex with the development of our modern civilization (if we may call it such); and it becomes impossible to regulate by the traditional processes of legislation and adjudication. Elihu Root was fully justified in saying to the American Bar Association in 1916 that the governmental functions for the protection of right and the prevention of wrong-doing "under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." We can no longer think of legislation merely in terms of legislative enactments, or of adjudication merely in the terms of action by the traditional courts.

We cannot, in fact, doubt the necessity for much regulation of our social and industrial affairs, nor can we doubt the necessity for administrative legislation and adjudication as instruments in such regulation. Two illustrations, drawn from a single field, clearly indicate this necessity.

Workmen's compensation is an essential element in our present economic structure. It involved not merely the substitution of liability without fault for liability in case of fault, but also the establishment of an administrative organization for the determination of compensation claims, with the result that court review with reference to such claims is employed in less than one-half of one per cent of the cases involving compensation for industrial accidents. Administration of workmen's compensation by the courts was first attempted in a number of states, but such administration failed, not because of inefficiency in the courts, but because the judicial machinery is not and cannot be adapted to the new problems of administration presented by the system of workmen's compensation. The courts have, however, performed, in a satisfactory manner, their function of review which has prevented abuses in the administrative process, and has maintained a uniform construction of the compensation statute in its particular jurisdiction. The judicial function has, however, been performed without material interference with the administrative process, and its aid has not been sought with respect to more than one out of each two hundred claims adjusted by the administrative agency.[2]

In a period within the memory of all of us, state statutes were in force regulating safety and health of industrial employees. These statutes did not accomplish their purpose, because legislators did not have and could not acquire technical familiarity with the requirements of various industries, and also because the rapidly changing conditions of industrial production quickly reduced the statutes to obsolescence. Statutory regulation was a failure, not because of legislative inefficiency, but because the legislative process could not be made applicable to the new and shifting conditions of industry. We now have in the larger industrial states statutes authorizing a permanent board or commission to make "reasonable rules" for the protection of employees, after notice to and hearing of interested parties, with a right to court review of the "reasonableness or lawfulness" of the rules within a specified time after their publication.[3]

The administrative process involves the exercise of powers of legislation or of adjudication, or both, by administrative bodies.[4] That is, the body charged with the enforcement of a statute may not only investigate violations of the statute and bring charges against the alleged violator, but may also set the standards to be observed in complying with the statute, prosecute the alleged violator, and by hearing determine whether the alleged violator is guilty or innocent. Such a union of powers appears in the Interstate Commerce Commission, Federal Trade Commission, National Labor Relations Board, Securities and Exchange Commission and others. This statement does not apply to all administrative agencies, either federal or state.

1. See Franklin D. Jones, Historical Development of the Law of Business Competition, 35 Yale Law Journal, 905, 36 *ibid*, 42, 207. For an excellent historical account of governmental regulation of insurance, see Patterson, The Insurance Commissioner, pages 513-537.

2. For an account of court administration of workmen's compensation see Dodd, Administration of Workmen's Compensation, pages 62-99.

3. For an account of this development see John B. Andrews, Administrative Labor Legislation (1936).

4. Landis, The Administrative Process (1938).

The Board of Tax Appeals, for example, is an administrative body charged with work of adjudication, with functions involving the enforcement of the law. Those charged with the enforcement of the Fair Labor Standards Act of 1938 have the duty to establish standards —a legislative function—and to enforce such standards, but the judicial function in the enforcement of the law is entrusted to the courts. In the administration of the Commodity Exchange Act there is a wide power to make rules—a legislative function; there are hearings of an adversary character in which the Commodity Exchange Commission or the Secretary of Agriculture appear as advocate or prosecutor as well as judge, and in other hearings the administrative body or officer is merely an impartial adjudicator of private interests.[5] In many other administrative proceedings of a judicial character—both state and national—the administrative body is acting not as an advocate or prosecutor but rather as an impartial arbiter—this is true in workmen's compensation. But it is necessary in some instances that the same body be prosecutor and judge, though not necessary that the same persons in such body shall act in this dual capacity.

Although not applicable to many administrative bodies, it is true as to others, both state and national, that:

"Rule-making and enforcement cannot be separated from interpretation and adjudication without sacrifice of efficiency and of the public interest sought to be protected or advanced."[6]

But the public interest in efficient administration is not alone to be considered; or rather, the protection of the individual from arbitrary and improper conduct of governmental agencies is in all cases to be regarded as in the public interest. The problem is that of combining efficiency in the administrative agency with the protection of the individual. This may be done without violating constitutional principles; but rather by the application of such principles.

The principle of separation of powers is not a principle of independence of the three departments of government, but rather a principle of coordination and interdependence of powers for the best performance of governmental functions, while at the same time protecting the individual from arbitrary action by any one department. It has been properly said that the relations of the three departments "must be fixed according to common sense and the inherent necessities of the governmental coordination."[7] Rate-making is regarded as legislative action, as is price-fixing under our more detailed regulations of today, but it has long been recognized that these detailed functions are impossible of exercise by state legislatures and by Congress; and while the making of the rate is regarded as legislative, the hearing necessarily involved in the making of the rate is regarded as quasi-judicial.[8]

The words quasi-legislative and quasi-judicial have been frequently used, but they have served their purposes as judicial aids in sustaining administrative or delegated legislation and administrative adjudication. It is not material to employer or employee whether a safety rule is found in a statute or in administrative regulations. Their interest is in complying with a valid exercise of the regulatory power of the government. But it is of importance to those subject to control that the greater mass of regulation is found now in administrative regulations rather than in statutes, and that the processes of administrative or delegated legislation thus become of primary interest. It has been correctly stated that "business and industry are no longer simple, and the rules required for their control are exceedingly complicated; they are no longer rules, indeed, but codes of regulation, as ramified as the business they regulate."[9] Such codes of regulation are to a large extent necessary, and it is not possible to have such details of regulation prescribed by Congress or by the several state legislatures.

It is not material to designate a hearing before a court as judicial and the same proceeding before a non-judicial body as administrative, and this is particularly true where the administrative hearing lays the foundation for a possible review by the court, in substantially the same manner as a proceeding in a trial court. "To differentiate the judicial from the administrative by an analysis of the operations performed in carrying out the two functions is as a general proposition a futile task."[10] It is material, however, to bear in mind that administrative bodies, national or state, are daily adjudicating many more claims than are the courts of the country. In 1936 one department of the United States government determined more civil cases than did all the federal courts, and its record of reversals on appeal to the courts was equally as good as that of the federal trial courts.[11]

The important question is not that of distinguishing powers of government, but rather that as to how the best results may be obtained from the closely related activities of the three departments. The principles of separation of powers and of delegation of legislative power are the servants and not the masters of our government, and place no undue restrictions upon the efficiency of administrative bodies.

There is necessarily a close inter-relation of the three departments with respect to administrative legislation and administrative adjudication. The legislative department must determine the powers of the administrative body and establish standards for the guidance of administrative action.[12] The legislative department

5. Procedure under the Commodity Exchange Act has recently been subjected to a careful review by Mr. Ashley Sellers under the direction of the Solicitor of the Department of Agriculture. This is one of a series of studies by Mr. Sellers, and it is hoped that the other departments and administrative agencies of the national government may prepare similar studies.

6. Chester T. Lane, General Counsel of the Securities and Exchange Commission, Handbook of the Association of American Law Schools, December, 1938, page 199.

7. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, page 406 (1928).

8. Perhaps the best discussion of rate-making and of the development of departmental relations is found in *Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N.Y. 123, 83 N.E. 693 (1908). For comments upon the delegation of federal power with respect to rates of interstate carriers, see *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), pages 407-408. The proceeding to determine rates of market agencies at stockyards is referred to as quasi-judicial in *Morgan v. United States*, 304 U.S. 1 (1938), page 14. In *Rathburn v. United States*, 295 U.S. 602, 55 S.Ct. 869 (1935), hearings before the Federal Trade Commission with respect to "unfair methods of competition" are referred to as quasi-judicial, and such functions are usually so designated.

9. Chester T. Lane in Handbook of the Association of American Law Schools, 1938, page 199.

10. Ray A. Brown, Administrative Commissions and the Judicial Power, 19 Minn. Law Rev. 261 (1935) page 275. Professor Brown has made an able comparison of the judicial with the administrative process in The Administration of Workmen's Compensation, University of Wisconsin Studies in the Social Sciences and History, No. 19 (1933).

11. O. R. McGuire, Reforms needed in the teaching of administrative law, 6 George Washington Law Review, 171, page 173 (1938).

12. There may, however, be a question as to the accuracy of this statement since decisions in *United States v. Rock Royal Co-Operative*, ....U.S. ...., 59 S.Ct. 993 (1939) and *Hood*

must necessarily be guided to a large extent by political motives and influences in the determination of policy, but it is detrimental to, and often destructive of the proper exercise of administrative functions if political pressures with respect to policy are to be transferred to the administrative body.[13] So far as it is possible, a line should be drawn against administrative legislation in matters involving political pressures. Wide delegation of policy-determination is as harmful to the administrative body as is too great a detail in legislation. The proper functioning of the administrative body is largely dependent upon the efficiency of the legislature and the draftsmanship of legislation.

Aside from judicial review of administrative determinations, the courts have been essential agencies in compelling the summary production of evidence before administrative bodies. The case of *Interstate Commerce Commission v. Brimson*,[14] decided by the United States Supreme Court in 1894, laid the foundation for statutory provisions with respect to the production of evidence before administrative bodies, both state and national. Without the court's power to punish for contempt, administrative hearings would have proved ineffective.

The administrative processes of legislation and of adjudication are necessarily different from the processes of the legislative and judicial departments of government. The same standards cannot be applied to each.

Nor can the same procedures apply to all administrative agencies. However, there are certain general principles applicable to administrative agencies which form the basis for minimum standards applicable to all, not only for the protection of the individual but for the protection of the administrative agencies as well. It is these standards in federal administration to which the Special Committee on Administrative Law of the American Bar Association has given its attention;[15] and it is to these standards in state administration to which the Committee on Administrative Agencies and Tribunals of the Judicial Section of the American Bar Association has given its attention.[16] Identical bills favorably reported and now pending in each of the two houses of Congress are largely based upon the measure proposed by the Association's Special Committee,[17] and their terms will hereafter be referred to in this article as the administrative law bill.

In order that the administrative processes of legislation and adjudication may succeed, they must have adequate safeguards to protect the individual, and their procedure must be such as to inspire public confidence in the administrative agencies.

## ADMINISTRATIVE OR DELEGATED LEGISLATION

Except in the limited number of cases in which statutes contain broad "Henry VIII clauses," the function of administrative or delegated legislation is subordinate to that of the legislative department. In England this subordination is maintained in large measure through the requirement that ministerial regulations be laid before Parliament, such submission to the legislative body being required in some cases within a specified period before the regulation comes into operation.[18] This plan, which has distinct merit with reference to policy-determining regulations, has recently been used in this country with respect to rules of civil procedure for the District Courts of the United States[19] and with respect to executive orders for the reorganization of federal governmental agencies.[20]

But the primary system (if it may be called a system) in this country in the past, and the one which is likely to remain for the future, is that of broad delegation with little or no further legislative consideration unless there is grave abuse of the delegated power. Legislative bodies may often conclude and properly conclude that regulatory legislation is necessary, but they may have neither the time nor the capacity to formulate details of regulation. No legislative body can be expert in all the subjects with which it must deal, and the legislative function here is not one of expertness in particular fields but rather one of popular representation in determining matters of general policy. The legislature is no more able to establish specific and more or less permanent standards for drugs and cosmetics than it is to establish labor safety standards in the various types of factories. In the fixing of specific railroad rates, as in most of the present fields of social and economic regulation, the needs of flexibility and expertness in detail make it clear that proper results "can be much more readily secured through the constant thought and ruling of an administrative commission than through the necessarily sporadic acts of a legislative assembly.[21]

Modern regulatory statutes can provide no more than the skeleton, and must leave to administrative bodies the addition of flesh and blood necessary for a living body. But to what extent is an arbitrary discretion to be placed in the hands of administrative bodies? Our statutes are full of indefinite terms which must be

*& Sons v. United States*, .... U.S. ...., 59 S.Ct., 1019 (1939).

Dean Landis favors statutory clauses giving administrative bodies "power to modify the provisions of legislation in so far as it may appear to be necessary to bring the scheme of regulation into effective operation." Landis, The Administrative Process, page 52. Such a broad power would be unwise if it left to the administrative body the judgment as to what is the scheme of regulation, and would involve a serious constitutional question if any limitations on delegated power still remain. The English Committee on Ministers' Powers recommended that clauses of this character (termed Henry VIII clauses) never be used except for the sole purpose of bringing an act into operation, and that they should be subject to a time limit of one year. Report of the Committee on Ministers' Powers (1932), page 65. Delegation of power to determine or change policies should not be made.

13. Policies in railroad rate-making delegated to the Commission have presented the greatest danger to the Interstate Commerce Commission. See Sharfman, The Interstate Commerce Commission, Part II, pages 452-477.

14. 154 U.S. 447, 14 S.Ct. 1125. In a few cases administrative bodies have been held to have power to punish for contempt. *In re Sanford*, 236 Mo. 665, 139 S. W. 376 (1911); *in re Hayes*, 200 N.C. 133, 156 S.E. 791 (1931). See also *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916).

15. A bill submitted by this Committee, in the form approved by the House of Delegates of the American Bar Association, appears in 25 American Bar Association Journal, 113 (February, 1939).

16. Recommendations with a draft bill appear in the report of the Section of Judicial Administration to the Annual Meeting of the American Bar Association in 1939.

17. Senate Bill 915, introduced by Senator Logan, "Providing for the more expeditious settlement of disputes with the United States, and for other purposes," reported favorably in revised form by the Senate Committee on the Judiciary, 76th Congress, 1st Session, Senate Report No. 442; House Bill No. 6324, introduced by Mr. Walter and favorably reported with amendments by the House Committee on the Judiciary, 76th Congress, 1st Session, House Report No. 1149.

18. Report of Committee on Minister's Powers (1932), pages 41-48.

19. Act of June 19, 1934, Ch. 651; 48 Stat. 1064, U.S. Code, Title 28, secs. 723b, 723c.

20. Act of April 3, 1939, Ch. 36.

21. Ernst Freund, Standards of American Legislation, page 302.

given force and meaning by administrative action.[22] In fixing railroad and utility rates, the Interstate Commerce Commission and state utility commissions are restricted to rates that are "just and reasonable"; the Federal Trade Commission is empowered and directed to prevent "unfair methods of competition"; the Federal Communications Commission is authorized to make regulations conducive to the "public convenience, interest or necessity"; in a number of states commissions are authorized to make "reasonable rules" for the safety of employees; the National Labor Relations Board determines "the unit appropriate for the purposes of collective bargaining"; and the Administrator of the Fair Labor Standards Act of 1938 may order minimum wage rates, not in excess of 40 cents an hour, if the rate "will not substantially curtail employment" and "will not give a competitive advantage to any group in the industry." These are but examples. Every relation of life is materially affected by state and federal regulatory legislation. Price-fixing and minimum wage regulation have become important state activities since the decisions in *Nebbia v. New York*[23] and *West Coast Hotel v. Parrish*.[24]

In the application of these broad powers, some discretion must be exercised in individual cases, and the process of administrative adjudication must be employed. But even where administrative adjudication is necessary, standards may be established for the guidance of those governed by the act and equally for the guidance of those administering the act. Where standards are possible they should be established.

"Standards, if adequately drafted, afford great protection to administration. By limiting the area of the exercise of discretion they tend to routinize administration and to that degree relieve it from the play of political and economic pressures which otherwise might be harmful."[25]

And by amendment or replacement standards can be altered if found erroneous or if changed conditions make alteration necessary.

Where standardization is possible, the alternative to specific administrative regulations is the "trial-and-error" method of developing a rule which may upon its development, be found in the successive decisions of the administrative body in individual cases. The case method of developing law has its place, but not in the development of administrative standards in any case where it is possible to state such standards before the individual is punished for violation of standards which he could not have known. Not only is the "trial-and-error" method unfair to the public but it leads to inefficient administration. The effort of the Federal Trade Commission to define "unfair methods of competition" by this process was unsuccessful; whereas the Securities and Exchange Commission has had a successful experience "in expressing its interpretation of the law in formal regulations and in advance opinions of its law department."

Dean Landis quotes but does not fully endorse a statement by Professor Milton Handler, but this statement is not too strong:

"The definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision. The method of judicial exclusion and inclusion does not permit of a sustained, consistent, comprehensive and speedy attack upon the trade practice problem. The case by case determination takes years to cover even a narrow field; it leaves wide lacunae; false starts are difficult to correct and the erroneous decision is just as prolific as a sound ruling in begetting a progeny of subordinate rules. In a controversy between two litigants or between a Commission and a private party, the lawmaking function is distracted by factors which are important to the contestants but irrelevant to the formulation of future policy. The fusion of law and economics, the detailed investigations and hearings, and the precise formulation of rules, all of which are so essential to a proper regulation of competition, are not feasible when law making is but a by-product of the adjustment of controversies. The combination of the two functions may have been justified when knowledge of the workings of competition was sparse and objectives ill-defined. It can no longer be justified today. It would be little short of criminal to rely upon so inefficient a method of law making when more scientific and expeditious devises are available."[26]

And it is proper also to endorse the statement recently made by Mr. Louis G. Caldwell that:

"The trouble with federal administrative tribunals, and with the Federal Communications Commission in particular, as I see it, is not with the procedure used in adopting regulations but rather that *the legislative method of making law is not used enough*. They rely too heavily on the slow, cumbersome and uncertain judicial method, the so-called gradual process of 'inclusion and exclusion' from case to case, in arriving at principles, in a word, in arriving at more definite sub-standards of a vague statutory standard such as 'public interest, convenience or necessity.'"[27]

Administrative regulations and interpretations aid in solving "the problem of letting the citizen know what government, in its many present phases, expects of him at the time when he needs to know in order to go about his business with reasonable assurance."[28] And they also meet Jeremy Bentham's censure of the tyrant who was so cruel "as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."[29]

Assuming that, wherever possible, administrative regulations should supplement and make definite the general provisions of statutes, the problem next presents itself as to the more proper procedure in the adoption and promulgation of such regulations.

The process of legislation through established legislative bodies is subject to certain safeguards all of which cannot be applied to administrative legislation. A representative policy-determining body, which must largely reach its results through a compromise of interests, is not adapted to the establishment of detailed administrative standards, which primarily involve methods of application rather than the scope of application of a statute. New safeguards for the process of administrative legislation must be found which will not interfere with the efficiency of the process, but these new safeguards must include (as does the legislative process) an opportunity for interested parties or groups to participate in the discussion and to have some share

22. See discussion of indefinite terms in Freund, Legislative Regulation, pages 230-258.

23. 291 U.S. 502, 54 S.Ct. 505 (1934).

24. 300 U.S. 379, 57 S.Ct. 578 (1937).

25. Landis, The Administrative Process, page 75.

26. Handler, Unfair Competition, 21 Iowa Law Review, 175, 259 (1936), quoted in Landis, The Administrative Process, page 86.

27. Louis G. Caldwell, Comments on the Procedure of Federal Administrative Tribunals, George Washington Law Review, April, 1939. The quotation in the text above regarding the Securities and Exchange Commission is also from Mr. Caldwell's article.

28. Herman Oliphant, Declaratory Rulings, 24 American Bar Association Journal, 7 (January, 1938).

29. This statement of Bentham is quoted by Professor E. W. Griswold in an article on Government in Ignorance of Law, 48 Harv. Law Rev. 198 (1934), and by Mr. Lester A. Jaffe in 12 University of Cincinnati Law Rev. 204 (1938).

in reaching the final result, but political pressures must be removed, so far as this is humanly possible. Such influences should obviously not determine the rules for safety in factories or standards as to purity of foods and drugs, but unfortunately all matters of administrative regulation are not so far removed from political interests.

In a study on *The Exercise of Rule-Making Power,* prepared by Professor James Hart for the President's Committee on Administrative Management,[30] certain safeguards are recommended in administrative legislation, and are termed "pre-natal" in that they would be employed in giving birth to new regulations. The suggested safeguards are: (1) The use of advisory committees; (2) Notice and formal hearings; (3) Publication of draft regulations; (4) Informal conferences with groups affected; and (5) Where possible, the setting up of permissive standards to be voluntarily tested and applied before they become mandatory.

The important element in these proposals is that of participation in the preparation of regulations by those who are to be regulated. The use of advisory committees and of informal conferences is desirable when haste is not essential, but must largely rest in the discretion of administrative agencies. Notice and an opportunity to be heard are essential, and may properly be joined with other safeguards which have proved of value.

The test of experience has shown the value of the plan adopted in a number of states, and heretofore referred to in this article, with respect to regulations for the safety of employees. This plan involves (1) the use of advisory committees with equal representation thereon of employers and employees; (2) notice of and hearings upon proposed rules, with publication of the rules approved by the commission and a 30-day period thereafter within which changes may be made by the commission on its own motion or as a result of written objections; (3) a right in any person affected by the rule to seek court review of "the reasonableness or lawfulness" of the rule, within 90 days after its adoption, the rule not becoming effective until 90 days after the entry thereof.[31]

A plan similar to that just outlined has been adopted into the Federal Food, Drug and Cosmetic Act of 1938 and the Federal Fair Labor Standards Act of 1938. Under the Food, Drug and Cosmetic Act,[32] advisory committees are not used, and under this act court review is by the United States Circuit Courts of Appeal with review by the United States Supreme Court upon certiorari or certification. Under the Federal Fair Labor Standards Act, industry committees are used, with equal representation of the public and of employers and employees, for the determination of minimum wage rates, and judicial review is by the same courts as in the Food, Drug and Cosmetic Act.[33] Under both of these federal statutes administrative findings of fact, if supported by the evidence, are conclusive.[34]

The bill sponsored by the American Bar Association and now pending in the two Houses of Congress[35] seeks to profit by state and federal experience in the drafting and promulgation of administrative regulations. The provisions of this bill with respect to administrative legislation may be briefly summarized:

(1) The vesting of power in all federal administrative agencies to adopt regulations interpreting, supplementing or executing the statutes with whose administration they are charged. The Security and Exchange Commission has broad powers in this respect; the Federal Trade Commission has insufficient powers. All administrative agencies should be authorized to establish standards for the guidance of their conduct in applying general and indefinite statutory standards; and none should be limited to the "trial-and-error" method; but equally the administrative process requires a continuing power to alter regulations in order to meet new conditions or to correct errors.

(2) The bill seeks, so far as possible, to make the establishment of standards mandatory upon the administrative agencies, so that both they and the persons affected may know what rules are to be observed, before they are called upon to observe them. The extent to which the rules applicable to individuals can be standardized must largely be left to the governmental agencies themselves, but much may be done both in the interest of the government and of the individual.

(3) Notice and an opportunity to be heard are provided with respect to the making or alteration of administrative regulations. Where hearings do not involve the rights of specific individuals, but rather the establishment of future standards, it is proper that the procedure be not so formal as that in hearings of a judicial character.[36]

(4) Prompt publication of all administrative regulations is provided, such regulations not to be effective until after publication, except when the President declares the existence of a public emergency. The passage of the Federal Register Act in 1935 and other developments may make it unnecessary for a court again to say as to a federal executive order:

> "Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist."[37]

30. Report of the President's Committee on Administrative Management, with Special Studies, pages 317, 339-342. See also J. P. Comer, Legislative Functions of National Administrative Authorities (1927).

31. The above analysis is based upon the Illinois statute of 1936, one of the latest to be adopted. Illinois Revised Statutes, 1939, Ch. 48, secs. 137.1-137.21. The operation of these acts in other states is fully discussed in John B. Andrews, Administrative Labor Legislation (1936).

32. Federal Food, Drug and Cosmetic Act, June 25, 1938, Ch. 675; 52 Stat. 1040; U. S. Code, Title 21, sec. 371.

33. "Fair Labor Standards Act of 1938," June 25, 1938, ch. 676; 52 Stat. 1060; U. S. Code, Title 29, secs. 201-219.

34. The statutes differ slightly in language as to the scope of review, but the difference in language is immaterial. The Food Act does not refer specifically to review by the United States Court of Appeals for the District of Columbia, but this is probably covered by a general grant of jurisdiction to Circuit Courts of Appeal. *Federal Trade Commission v. Klesner,* 274 U.S. 145 (1927).

35. See specific citation in note 17. The bill now pending is, of course, subject to further amendment before final action of Congress.

36. This distinction has been properly made by Mr. Ashley Sellers in his study of Administrative Procedure and Practice in the Department of Agriculture under the Commodity Exchange Act (1939).

37. *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), page 412. See Federal Register Act of 1935 with additional amendment for periodical codification, U.S. Code, Title 44, secs. 301-314. For full reviews of this subject see James H. Ronald, Publication of Federal Administrative Legislation, 7 George Washington Law Rev. 52 (1938); and Lester A. Jaffe, Publication of Administrative Rules and Orders, 12 University of Cincinnati Law Rev. 203 (1938). Mr. Jaffe's article is reprinted in 24 American Bar Association Journal 393 (1938).

But some general provision as to time and place of publication is necessary.

(5) Within thirty days after the publication of an administrative rule, the United States Court of Appeals for the District of Columbia is given jurisdiction, on petition, to determine whether the rule conflicts "with the Constitution of the United States or the statute under which issued." This judicial review is substantially that provided by the Federal Food, Drug and Cosmetic Act and by the federal Fair Labor Standards Act, but is much narrower than that provided in state acts for safety of employees. It relates only to the power to make the rule, and to compliance with the requirement of statute in making the rule.

(6) It is also proposed to supplement the requirement of publication of regulations by a saving clause to the effect that:

"No person shall be penalized or subjected to any forfeiture or prosecuted for any act done or omitted to be done in good faith in conformity with a rule which has been rescinded or declared invalid by any final judgment entered as hereinafter provided, unless the act was done or omitted to be done more than thirty days after the publication in the Federal Register of the rescission or final judicial determination of the invalidity of such rule."

This is similar to a provision in section 209(b) of the Securities Exchange Act of 1934, and Mr. Herman Oliphant properly indicated its necessity and value in giving greater freedom to administrative officers "needed to clarify legislation by the process of administrative definition and application."[38] So long as administration is in the hands of human beings, errors will occur, and it is obvious that those who have acted in good faith upon the basis of such errors should not be penalized. Such a safeguard as that quoted above is particularly needed when an administrative agency is operating in a new field of governmental regulation where of necessity the "trial-and-error" procedure must be employed, even in the adoption of regulations and in the administrative interpretation of a statute.

There can be no doubt as to the value of general standards, applicable to all federal administrative bodies, prescribing conditions under which such bodies may enact administrative legislation. The standards must be flexible, and the proposed plan preserves flexibility. Nor can there be doubt of the advisability of notice to and an opportunity to be heard by those affected by proposed regulations. It has been suggested that these requirements will unduly restrict the discretion of administrative bodies, but it may properly be said in answer that the individual is entitled to know what he is permitted or forbidden to do in all cases in which he can be so informed before he is required to act. This imposes no undue burden upon the body charged with the enforcement of governmental policy. Discretion is necessary in administration, but arbitrary discretion when uniform standards can be established, is despotism.

The plan outlined above has been subjected to criticism because it confers a jurisdiction on the United States Court of Appeals for the District of Columbia to entertain a petition, within thirty days after the publication of a rule, to determine whether the rule is in conflict with the Constitution, in excess of the power conferred by statute or has been issued without meeting the requirements of notice, hearing and publication. It has been objected that (1) this plan will force parties affected by the rules to incur the expense of going to Washington to contest the rule; (2) that it is placing an improper function in the hands of the court; and (3) that it will result in extensive litigation and materially delay and interfere with the administrative process. With respect to the first of these points, it may be replied that the bill expressly provides that the right to proceed before the District of Columbia court is in addition to, and not in substitution for, the right to contest the validity of the rule in any court of competent jurisdiction. To contest the rule it would not be necessary to resort to Washington, but such resort would in most cases not be burdensome, for the rule would be made there and would ordinarily affect an industrial organization having permanent representatives in Washington. With respect to the second objection it may be replied that the adoption of a rule or statute may in and of itself so affect the rights of the parties as to support a judicial proceeding without the necessity of statutory authorization. Such proceedings are common in both state and federal courts.[39] This practice has been extended, and properly, by declaratory judgment statutes, and in states not having such statutes, injunction accomplishes the same result. Even if the function were not judicial, the power could be vested in courts of the District of Columbia, over whose jurisdiction the Congress has complete control, and the only question would then be as to possible review by the Supreme Court of the United States.[40] In the many states having judicial review of safety rules for employees there has been no contest of this power on the ground that it may not properly be exercised by the judicial department.

With respect to the claim that judicial review of rules will result in a mass of litigation and in delay of the administrative process, it may perhaps be suggested that the judicial review is a limited one, and that no mass of litigation or delay of the administrative process has resulted from the much broader judicial review of state safety regulations for employees. In fact substantially no litigation has resulted. Nor, under a scope of review closely comparable, have delay or litigation resulted under the federal Food, Drug and Cosmetic Act or under the federal Fair Labor Standards Act. The administrative law bill now before Congress does not provide that the operation of a rule shall be stayed during the contest of its validity, and perhaps should contain a provision that operation should not be stayed unless specifically ordered by the Court, as does the Fair Labor Standards Act. It is safe to say that, with the safeguard of notice and hearing, few rules will be contested, and that with prompt judicial action and a discretion in the court as to the staying of the operation of a rule, no injury to the administrative body will result.

The report on *The Exercise of Rule-Making Power*, prepared by Professor James Hart for the President's Committee on Administrative Management, properly said that "Modern legislation should throw all practicable safeguards around the rule-making power" and that Congress should "investigate the advisability of providing a means of challenging the validity of regulations that affect the public by a simplified procedure, without delay, and at a nominal cost."[41] Such a simplified procedure is here recommended.

38. Herman Oliphant in 24 American Bar Association Journal, page 9 (1938).

39. See, for example, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

40. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930).

41. Report of President's Committee on Administrative Management with Special Studies, page 317.

We must agree with the English Committee on Ministers' Powers that

"The delegation of legislative powers is legitimate for certain purposes, within certain limits, and under certain safeguards. It is plain that it is in fact inevitable."

This Committee recommended that "apart from the jurisdiction of the courts of law to decide whether a minister has acted within the limits of his delegated power," regulations made by ministers in the exercise of delegated law-making power should be laid before the House of Commons subject to careful committee consideration and to annulment by parliamentary act. Such a safeguard may be properly used under the English parliamentary system, where the ministers are parliamentary leaders of the dominant party, but is capable of but limited application in the United States and, if used, would unduly handicap the administrative power. Under our relationship between the legislative and executive departments, the principle of separation of powers can best operate through judicial safeguards which may properly protect the individual from the arbitrary power of a single official or group of officials in his dealings with governmental authority. This is, in fact, the purpose of the principle, and it can here be properly applied so as to improve the efficiency of governmental action.[42]

## ADMINISTRATIVE ADJUDICATION

Powers of administrative legislation and administrative adjudication are not necessarily united in the same body. The Administrator of the Fair Labor Standards Act is charged with the establishment and enforcement of standards, without power of adjudication. The Board of Tax Appeals is charged with the function of adjudication alone, although this function has an important share in the construction of tax statutes. Where functions of legislation and adjudication are united in the same body, it is natural that its adjudication will favor the objectives laid down in the regulations or constructions adopted by it.

Administrative adjudication may be either the adjudication between private parties in interest or an adjudication of charges which the administrative body itself has preferred. For example, a determination of a workman's compensation claim may be regarded as a controversy between an employer and employee; whereas no such adversary relation between individual parties appears of record where a charge of violation of the National Labor Relations Act is investigated by the National Labor Relations Board, a complaint served against the employer by the Board, a hearing held before a trial examiner designated by the Board, and the evidence in support of the complaint presented by the Board's attorney.[43] It has been properly said that: "Any individual who has at one and the same time the duty of prosecuting and judging, labors under a psychological handicap which may either dull his zeal as an advocate or warp his judgment as an adjudicator."[44]

But, as has been previously indicated, it is in many cases necessary to unite the functions of investigation, prosecution and adjudication in the same administrative body, but not necessarily in the same individuals within that body. Much has been done and much remains to be done by the separation of these functions in the administrative body itself.[45] It has been correctly stated in the article by Gelhorn and Linfield that, in the administration of the National Labor Relations Act, separate and independent personnel are provided for the functions of field examiner, trial examiner, board attorney conducting the Board's case on hearing, and the review attorney who in fact prepares the Board's findings and order. But there is of necessity an association of these several groups, and the joint feeling that they are working for a common objective. However, the separation of functions within the body itself to a large extent reduces administrative proceedings to a common basis, irrespective of whether the issue is between private parties or is one in which the administrative agency is prosecutor. In either case favoritism based on honest prejudice or political or other considerations will accomplish the same result as the union of prosecutor and judge.

Dean Landis has said that trial examiners of an administrative agency should have "a proper bias toward its point of view," and that "loyalties to the ideas embodied in the legislation is also a reason for administrative tribunals. . . Partisanship on the part of the administrative tribunals is thus to be expected. It is there to carry out the provisions of the legislation."[46] Whether we agree or disagree with Dean Landis' view, it expresses an ever-present fact. And from the standpoint of efficiency, it is desirable that each administrative body and its personnel have an enthusiastic conviction that its functions are the most important, but it is equally desirable that some external influence preserve a balance that prevents any one of the bodies from unduly extending or abusing its powers.

"Government by experts would, however ardent their original zeal for the public welfare, mean after a time government in the interest of experts. Of that the outcome would be either stagnation, on the one hand, or social antagonism on the other."[47]

Assuming what can never be true—administration

(*Continued on page* 973)

42. See Thomas Reed Powell, Separation of Powers; Administrative Exercise of Legislative and Judicial Powers, 27 Political Science Quarterly, page 238 (1912). In cases of emergency, of course, initial administrative action must often be taken irrespective of safeguards, but the injured party must have a remedy. See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101 (1908), and *Southern R. Co. v. Virginia*, 290 U.S. 190, 54 S.Ct. 148 (1933). Emergency actions are dealt with in section 4(d) of the administrative law bill.

43. For procedure of the National Labor Relations Board see J. Warren Madden in Handbook of the Association of American Law Schools, 1938, p. 168; and Gelhorn and Linfield, Politics and Labor Relations, 39 Columbia Law Review, 339 (1939). For procedure before the Securities and Exchange Commission, see Chester T. Lane in Handbook of the Association of American Law Schools, 1938, p. 184. For procedure before the Federal Communications Commission, see Louis G. Caldwell in George Washington Law Review for April, 1939. For a brief statement of the procedures of the Federal Trade Commission and the Securities and Exchange Commission, see Landis, The Administrative Process, pages 94-95. For procedures under the Commodity Exchange Act, see Ashley Sellers, Administrative Procedure and Practice in the Department of Agriculture under the Commodity Exchange Act (1939). The Interstate Commerce Commission procedure is fully discussed in Sharfman, The Interstate Commerce Commission, Part IV.

In the present article no consideration is being given to administrative functions not involving adjudication or as to which adjudication is regarded as a matter of grace rather than of right. See the distinctions by Mr. Clyde Duffy in 25 American Bar Association Journal, 838 (1939).

44. Ray A. Brown, Handbook of the Association of American Law Schools, 1938, page 225.

45. See papers by Madden, Gelhorn and Linfield, Lane, and Caldwell, cited in note 43. Apparently the Federal Communications Commission is moving toward a closer union of judge and prosecutor.

46. The Administrative Process, 104; Handbook of the Association of American Law Schools, 1938, page 229.

47. Harold J. Laski, The Limitations of the Expert, 162 Harpers Magazine, 101 (1930).

# REPORT OF THE JUDICIAL CONFERENCE
## September Session, 1939

THE Judicial Conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218), convened on September 28, 1939, and continued in session for three days. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge Scott Wilson.

Second Circuit, Senior Circuit Judge Learned Hand.

Third Circuit, Senior Circuit Judge John Biggs, Jr.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Fifth Circuit, Senior Circuit Judge Rufus E. Foster.

Sixth Circuit, Senior Circuit Judge Xenophon Hicks.

Seventh Circuit, Senior Circuit Judge Evan A. Evans.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

District of Columbia, Chief Justice D. Lawrence Groner.

The Senior Circuit Judge for the Tenth Circuit, Judge Robert E. Lewis, was unable to attend and his place was taken by Circuit Judge Orie L. Phillips.

The Attorney General and the Solicitor General, with their aides, were present at the opening of the Conference.

*State of the dockets.—Number of cases begun, disposed of, and pending, in the Federal District Courts.* The Attorney General submitted to the Conference a report of the condition of the dockets of the district courts for the fiscal year ending June 30, 1939, as compared with the previous fiscal year. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The report of the Attorney General disclosed the following comparison of cases commenced and terminated during the fiscal years 1937 and 1938:

| | Commenced | | Terminated | |
|---|---|---|---|---|
| | 1938 | 1939 | 1938 | 1939 |
| Criminal | 34,099 | 34,701 | 34,214 | 35,588 |
| Civil | 33,409 | 33,531 | 38,155 | 37,463 |
| Bankruptcy | 57,306 | 50,997 | 57,303 | 52,102 |

For every year since 1932, the Conference has noted a decrease, more or less pronounced, in the number of cases pending in the district courts. The figures for the year ending June 30, 1939, show a continuation of this trend:

| Pending cases | 1938 | 1939 |
|---|---|---|
| Criminal cases | 10,896 | 10,009 |
| United States civil cases | 11,285 | 9,593 |
| Private suits | 24,587 | 22,347 |
| Bankruptcy cases | 54,277 | 53,172 |
| Total | 101,045 | 95,121 |

It will be observed that there has been some increase in the number of criminal cases filed and terminated. But the increase in the number terminated has been greater than the increase in the number filed. The result is some reduction in the number of cases pending at the end of the year, this amounting to almost 9%.

There is an increase of 122 civil cases in the number filed during the year ending June 30, 1939, as compared with the preceding year. This difference is little more than negligible. And it appears that during the past year and the preceding year the number of civil cases terminated was approximately 4,000 in excess of the number filed so that there has been a steady decrease in the number of pending cases.

Taking together the United States civil cases and private suits, the total number of civil cases pending at the end of the fiscal year 1937 was 40,618; in 1938, 35,872; and in 1939, 31,940. This decrease in the volume of pending cases is probably due, the Attorney General suggests, to the increase in the number of judges.

There has been a marked reduction in the number of bankruptcy cases filed during the last fiscal year. But as there has been a similar diminution in the number of proceedings concluded, the reduction in the number of pending cases is much less than the diminution in the number filed.

*Arrearages.—Delays in the disposition of cases.*— There has been a marked reduction in the arrears of civil cases as disclosed by the tabular statement submitted by the Attorney General. It is thus shown that on June 30, 1939, 65.3% of civil cases had been pending six months or over as against 67% in 1938; 45.6% had been pending one year or over, as against 50.2% in 1938; 25.1% for two years or over, as against 32% in 1938; 17.3% for three years or over, as against 22% in 1938; 12.1% for four years or over, as against 16% in 1938; and 9.4% had been pending five years or over, as against 13% a year ago.

We pointed out last year in considering the tabular statement submitted that to obtain a true picture of the state of judicial work it was necessary to consider the reasons why cases had been pending for a considerable time and not simply the number set forth. There are many reasons for the pendency of cases which do not involve inordinate delays. Thus, as we said last year, cases may be held to await a decision in some other jurisdiction, which would make a trial unnecessary or affect the rights involved, or to await the result of negotiations for settlement; foreclosure suits may be suspended by moratorium or redemption statutes; the litigation may be ancillary to that in another jurisdiction or there may be an injunction restraining proceedings; or cases may be held awaiting appeals.

It can not be too often emphasized that judicial statistics require analysis and knowledge of the circumstances to which they relate, and while they may in a general sense be of value to show a trend, they often afford an inadequate basis for a just conclusion. When the present report was received, several of the Senior Circuit Judges made inquiries to ascertain the actual reasons for the delays which were shown. The result was to indicate that in many cases the delays were justified. There is, however, as pointed out, a gratifying reduction in arrears and this has been due to the efforts of the judges to expedite the disposition of cases. Last year, we pointed out that one remedy which had proved effective in many jurisdictions was to have the entire docket called at reasonable intervals so that the "dead wood" may be removed and the cases

that are expected to be tried may be brought to a speedy determination. This practice, as recommended, has been followed in a number of districts.

The Attorney General observes that except in a few congested centers the court dockets are "in excellent condition and generally current, the waiting time for trials being caused by the intervals between terms of court." While it appears, as the Attorney General states, that 18 out of 85 districts—as against 17 a year ago—report more or less congestion in their dockets, a comparison of the conditions in the two years indicates that the extent of the congestion and arrears has considerably diminished; that only in the District of Columbia, the Southern District of New York and the Western District of Washington have the arrears increased.

In the District of Columbia, it is hoped that the recent increase in the number of judges will result in at least an amelioration of the great delays there existing. But this may not prove to be a complete cure in view of the fact that the number of civil cases filed during the year was 5,601 as against 5,045 during the preceding year. On the other hand, there has been a diminution in the number of criminal cases filed.

In the Southern District of New York the arrears appear to be again accumulating. In the Western District of Washington there has been a considerable increase in the arrears in jury cases and some increase as to non-jury cases.

The Attorney General reports that in the Northern District of Georgia, the Western District of Louisiana, the Eastern District of Michigan and the Northern District of Ohio, while there is still congestion, that reported a year or two ago appears to have been considerably alleviated.

The Attorney General also states that the following districts which showed arrears a year ago now report that the dockets are current:

Northern District of Alabama, Eastern District of Illinois, Eastern District of Kentucky, District of Massachusetts, Eastern District of Pennsylvania, Middle District of Pennsylvania, Northern District of Texas.

It is believed that in the District of Massachusetts an important factor in clearing up the congestion has been the adoption of pre-trial procedure for all jury cases.

It appears that in the following districts where the dockets were reported to be current a year ago there is now congestion to a greater or less degree:

Eastern District of Arkansas, Northern District of California, Northern District of Illinois, Western District of Kentucky, District of New Jersey, Middle District of Tennessee, Eastern District of Washington.

The Attorney General adds that in the Eastern District of Arkansas, the Northern District of California and the Eastern District of Washington, this state of affairs is due to temporary conditions.

The statement and tables submitted by the Attorney General were supplemented by full reports by the Senior Circuit Judges from each circuit as to the condition of the dockets in the several districts.

*Circuit Courts of Appeals.*—We are able to report, as heretofore, that in general the Circuit Courts of Appeals are up with their work. We called attention last year to the accumulation of cases in the Sixth Circuit. Progress has been made in the disposition of these cases and the Conference believes that with the present force of circuit judges the Circuit Court of Appeals will be able in the near future to make its docket fairly current.

We also pointed out last year that the Circuit Court of Appeals for the Eighth Circuit had been able to keep abreast of its work only through the aid of retired judges. After a careful review of the situation there, the Conference decided to recommend one additional circuit judge for that circuit.

No other recommendations for additional circuit judges are made at this time.

The Conference renews its recommendation that Sec. 212 of Title 28 of the United States Code should be amended so that, in a circuit where there are more than three circuit judges, the majority of the circuit judges may be able to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable.

*District Courts.—Additional judges required.*—The Conference carefully considered the reports submitted by the Attorney General and also the intimate description of conditions furnished by the circuit judges.

In the Southern District of New York additional judges are clearly required. The Conference recommends that the vacancy caused by the appointment of Judge Robert P. Patterson to the Circuit Court of Appeals should be filled, and that the present restriction should be removed. (See Act of May 31, 1938, sec. 4(d); 52 Stat. 584.) The filling of this vacancy, however, will not afford all the judicial assistance that is needed and the Conference recommends that provision should be made for two additional judges, that is, in addition to the filling of the vacancy above mentioned. This recommendation is made with the qualification that it be provided that the first three vacancies occurring in the district court in that district shall not be filled.

The Conference also recommends that provision be made for an additional district judge in the following districts:

1 additional district judge for the District of New Jersey;

1 additional district judge for the Eastern District of Pennsylvania;

1 additional district judge for the Northern District of Georgia;

1 additional district judge for the Northern District of Ohio;

1 additional district judge for the Eastern District of Missouri;

1 additional district judge for the Southern District of California;

1 additional district judge for the Western District of Oklahoma.

*Court rules.*—In view of the changes necessitated in the rules of courts by reason of the adoption of the Rules of Civil Procedure, the Conference last year appointed a committee to review the rules of the Circuit Courts of Appeals for the purpose of making recommendations in order to obtain uniformity so far as might be found practicable. This committee was composed of Circuit Judges Parker, Hicks, Wilbur and Phillips.

At the present session of the Conference, Judge Parker submitted two rules which had been drafted in cooperation with a committee of the Department of Justice, of which Hon. James W. Morris was chairman. These rules concern the review by the Circuit Courts of Appeals (a) of orders of the Board of Tax Appeals and

of the United States Processing Tax Board of Review, and (b) of orders of other administrative bodies. The Conference recommends to the several Circuit Courts of Appeals the adoption of these rules, as thus submitted, in the form in which they are proposed.

*District Court rules.*—At the last Conference a committee was appointed, composed of District Judge John C. Knox of the Southern District of New York, District Judge William P. James of the Southern District of California, and District Judge Robert C. Baltzell of the Southern District of Indiana, to examine the various rules of the District Courts and to make recommendations so that the greatest practicable degree of uniformity throughout the country should be secured. This committee was assisted during the year by Major Edgar B. Tolman and by representatives of the Department of Justice. A tentative draft of uniform local rules was prepared and presented to the members of the Conference.

The Conference continues this committee for another year to the end that the above-mentioned report and such further suggestions as may be made should be considered.

*Boundaries of judicial circuits and districts.*—At the Conference held in 1937 a committee was appointed to consider possible changes in the boundaries of existing circuits and districts and to confer with the appropriate committee of the Senate and House of Representatives with relation to this matter. The Conference continues this committee which, as now constituted, consists of Judges Foster, Wilbur, Phillips and Learned Hand.

*The administration of the United States courts.*—For some time measures have been under consideration looking to the establishment of an administrative office of the United States courts. One objective was to give to the courts the power of managing their own business affairs and to that extent to relieve the Department of Justice of responsibility. Another objective was to secure an improved supervision of the work of the courts through an organization under judicial control. After full discussion of these objectives the Conference at its last session appointed a committee to prepare recommendations in collaboration with the Attorney General. This committee was composed of Chief Justice Groner of the United States Circuit Court of Appeals for the District of Columbia, and Circuit Judges Manton, Parker, Evans and Stone. The result of the collaboration of this committee with the committee appointed by the Attorney General and with representatives of bar associations has been the promotion and ultimate adoption of legislation to attain the desired ends. The Act, which adds a new chapter (Chap. XV) to the Judicial Code entitled "The Administration of the United States Courts," was passed by the Congress and was approved by the President on August 7, 1939, to take effect ninety days thereafter.

A large part of the present session of the Conference has been taken up with a discussion of the provisions of this Act and of the necessary steps fully to achieve the purposes in view. The Act provides for the appointment by the Supreme Court of the United States of a Director and an Assistant Director of the Administrative Office. While these appointments are to be made by the Supreme Court, the Act provides that the Director shall have charge of the matters specified "under the supervision and direction of the conference of senior circuit judges." The Director is charged with duties of the highest importance and it was deemed not only fitting but necessary that the Conference of Senior Circuit Judges, in order to exercise the intended supervision over his activities, should be represented by a committee which shall be in immediate touch with the Director and be in a position to keep the Conference fully informed. For this purpose the Conference has appointed an Advisory Committee to advise and assist the Director in the exercise of his duties until further order of the Conference. The committee is composed of the Chief Justice of the United States, as chairman, Chief Justice Groner of the United States Court of Appeals for the District of Columbia, and Circuit Judges Parker, Stone and Biggs.

The Act provides (sec. 306) that, to the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at least twice a year a council composed of the circuit judges for the circuit at which the senior circuit judge shall preside. The senior judge is directed to submit to the council the quarterly reports which the director is required to submit (sec. 304(2)) in relation to the state of the dockets of the various courts, their needs of assistance, the preparation of statistical data and information as to the business transacted. It is made the duty of district judges promptly to carry out the directions of the council as to the administration of the business of their courts. The Conference considered the duty of the circuit judges under this provision and the responsibility of the council, convened and informed as stated, for the appropriate expediting of the work of the district courts.

In addition to these councils composed of the circuit judges in each circuit, the Act provides (sec. 307) that a conference shall be held annually in each judicial circuit which shall be composed of circuit and district judges in such circuit, who reside within the continental United States, with participation of members of the bar under rules to be prescribed by the Circuit Courts of Appeals. These conferences are stated to be for the purposes of considering the state of the business of the courts and of advising ways and means of improving the administration of justice within the circuits.

The Conference considered these provisions and several of the circuit judges described at length the character of the proceedings of conferences which had been held in their circuits, including the sort of questions presented, the arrangement of programs and incidental matters. The profitable results of these conferences in a number of circuits were emphasized.

It is confidently expected that through the operation of this Act the important objectives to which reference has been made will be measurably attained.

*Sentences in criminal cases.*—The Conference appointed a committee composed of Judges Learned Hand, Evans and Wilbur to consider and report upon the feasibility of an indeterminate sentence law for the federal courts; also with respect to the advisability of conferring upon the Circuit Courts of Appeals the power to increase or reduce sentences.

*Rules of practice and procedure in criminal cases.*—The Supreme Court, on May 7, 1934, pursuant to the Act of March 8, 1934, promulgated Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia. The Conference requests the Supreme Court to consider amendments of these

rules so as to conform the practice relating to records on appeal in criminal cases to the practice provided for by the Rules of Civil Procedure. The Conference also requests the Supreme Court to consider an extension of the Criminal Appeals Rules (within the authority conferred by the Congress) to appeals from courts to which the rules do not presently apply.

The Conference approved Senate Bill No. 1283, 76th Congress, 1st Session, which provides for the conferring upon the Supreme Court of the power to promulgate rules of pleading, practice and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by a court if a jury has been waived, or plea of guilty, in criminal cases in the various courts specified.

*Rules of evidence in criminal cases in the federal courts.*—The Conference appointed a committee composed of Judges Phillips, Hicks and Wilbur to study and report on the advisability of legislation with respect to the rules of evidence, and also the competency and privilege of witnesses, in criminal cases in the courts of the United States.

*Provision for law clerks.*—The Conference directs that the Director of the Administrative Office of the United States Courts, upon his appointment, prepare as soon as practicable for the consideration of the Conference proposals with respect to the salaries of law clerks of district judges and circuit judges with a view to a recommendation of such legislation as may be found advisable.

*Court reporters.*—The subject of compensation of court reporters was referred to the Director of the Administrative Office of the United States Courts to the end that as soon as practicable after his appointment he should prepare recommendations for the consideration of the Conference.

*Public defenders.*—Upon considering its former recommendation upon this subject, the Conference approved in substance S. 1845 and H. R. 4782, 76th Congress, 1st Session, with respect to the appointment of public defenders.

*Recess.*—In view of the fact that action may be required by the Conference in connection with the operation of the Act creating the Administrative Office of the United States Courts, the Conference, instead of adjourning, declared a recess subject to the call of the Chief Justice.

For the Judicial Conference:

CHARLES E. HUGHES,
*Chief Justice.*

September 30, 1939.

# ASSIGNMENTS FOR THE PURPOSE OF AVOIDING TECHNICAL RULES OF SUBROGATION

BY STEVENS T. MASON
*Member of the Detroit Bar*

SUPPOSE a trusted employee forges the signature or endorsement on his employer's check and cashes it and keeps the money. In due course the check is paid by the drawee bank and charged to the employer's account.

Immediately the drawee bank becomes liable to the employer, because it has paid out the employer's money without proper authority. This is often referred to as a harsh rule but it is well settled. 9 C. J. S. 730, 734.

Now suppose a surety pays the employer his loss. Does the surety thereby become subrogated to the employer's right to enforce the liability of the drawee bank? The authorities say no. Because subrogation is an equitable doctrine. The surety and the bank are both innocent of culpable negligence in the transaction. Therefore the equities of the surety are no greater than the equities of the bank. Where equities are equal there can be no relief. "Aequitas est aequalitas." Title & Mortgage Co. v. First Nat. Bk., 51 Fed. 2d 485; 77 A.L.R. 1052 and annotation at 1057.

Let us now go one step further. Suppose the employer gives the surety an assignment of his claim against the drawee bank. Can the surety, who is denied subrogation, recover on the assignment?

This is a serious question. It was answered in the negative in the case of Meyers v. Bank of America (Cal.) 77 P. 2d 1084. There the surety paid a check forgery loss, took as assignment from the obligee and sued the cashing bank. The court held that assignment is a form of subrogation, and as the surety was not entitled to subrogation by the application of equitable principles, the assignment added nothing to the enforceability of the cause of action, and that the action could be defended as though no assignment had been given. The court cited many cases and in conclusion said:

"Thus, it may be observed that there are two lines of cases governing the question here presented, each wholly at variance with the other."

The first line of cases cited is headed by the Michigan case of Metropolitan Cas. Ins. Co. v. First Nat. Bk., 261 Mich. 450; 246 N. W. 178. In that case a trusted employee forged checks and cashed them. The insurance company instead of paying its own assured paid the drawee bank and took an assignment against the cashing bank and brought suit. The defense was made that the equities of the surety were no greater than the equities of the bank and there could be no recovery. The court said:

"If the plaintiff were here asserting equitable or legal subrogation, its right to recover might be open to question, but as it asserts right upon the contract it comes in legal effect as an assignee, and hence may have judgment."

The second line of cases cited by the California Supreme Court is headed by the following quotation from 60 C. J. 749:

"While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated, the completion of the surety's subrogation, and his right to pursue the rights and reme-

dies of the creditor, is not dependent on the willingness of the latter to make an assignment, for in equity the surety's payment causes an assignment by operation of law and no formal assignment or transfer is necessary. On the other hand, it seems that, if the surety is not entitled to subrogation, an assignment by the creditor will be ineffectual to give the surety a right of subrogation he would not otherwise have."

This sounds at first rather startling, but when carefully analyzed it reduces itself to the proposition that an assignment cannot enlarge the equitable doctrine of subrogation.

This is not at variance with the Michigan case which simply gives full recognition to the assignment, not as adding anything to the equitable doctrine of subrogation, but as possessing a legal substance of its own, upon which recovery may be had.

There can be no question about the fact that a person who is possessed of a right of action may assign it to another. 6 C. J. S. 1079.

An assignment like any other contract must, of course, have consideration, and if the only consideration is the payment of a loss which the surety is legally bound to pay, the consideration might be questioned, but not by the debtor. His only concern is that he be not compelled to pay twice, and he may not question the consideration or the motive of the assignment. 6 C. J. S. 1119, 1120, 1184.

But regardless of that question practically all surety bonds have clauses which require the insured to execute all necessary assignments upon the payment of a loss. This is part of the consideration for the original contract of suretyship.

There is nothing in the corpus juris rule which says that an assignee can be deprived of any substantive right which the assignment conveys.

An elusive distinction is sometimes made by dividing subrogation into two classes, legal and conventional.

"Conventional subrogation is the substitution of the surety in place of the creditor by agreement as distinguished from subrogation by operation of law where no such agreement is made." Stearns on Suretyship (3rd Ed.), Section 260. "Conventional subrogation can take effect only by agreement. It has been said to be synonymous with assignment." 60 C. J. 704. See also 25 R. C. L. 1312.

The Michigan rule as announced in Metropolitan Cas. Ins. Co. v. First National Bank, supra, places the ultimate loss where it belongs, on the cashing bank which trusted either the forger or someone else who vouched for his integrity. The rule is in harmony with the decisions of the United States Supreme Court.

In Luckenbach v. McCann Sugar Refining Co., 248 N. S. 139, 1 A. L. R. 1522, an insurance company instead of making a straight payment to its assured for the loss of goods shipped by freight, made a loan of the money to avoid certain technical provisions in the bill of lading, and took back a conditional loan receipt so that the insured could become the plaintiff in a suit against the carrier. Thus the purpose of the loan receipt was the same as the purpose of the assignment under discussion, i.e., to avoid the strict rules of subrogation. Mr. Justice Brandeis writing for the court said:

"The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. . . . It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

The purpose of the assignment in question is to prevent legal technicalities from interfering with the transfer of a chose in action so that the needs of commerce may be served by placing the loss on the party who permitted it to occur, and thus tending to bring down the premium cost of these bonds. And, as Mr. Justice Brandeis said, no good reason appears for questioning its legality or denying its effect.

The equitable doctrine of subrogation may lead us into many by-paths of interesting questions of law. But the needs of commerce require action, and the ingenuity of business men can often meet the demands of justice more effectively than the learning of profound lawyers. Business men would never adopt a rule which holds an assignment valid when made to a stranger, but invalid when made to the party who actually paid the loss. The constant complaint of "two lines of cases wholly at variance" does not contribute to the needs of commerce, neither does it foster confidence in the law or in lawyers.

The United States Supreme Court in recent decisions has made it quite plain that court decisions should as far as possible be kept abreast with the times.

The days when we made deeds to a strawman and assignments to a dummy are passing out. The solution of the great problems of today require minds that are bigger than those that quibble over the meaning of words and the construction of phrases.

We hear on all sides the complaint that the "Law Business" is not what it used to be. Why should it be when business men hesitate to allow their affairs to become enveloped in a fog of legal technicalities? They much prefer to settle their own altercations and disputes, even at a loss, than to take the risk of becoming entangled with "two lines of cases wholly at variance."

The legal profession is dependent for its existence upon the confidence of the layman. Let us take the advice of Mr. Justice Brandeis and try to reconcile the demands of justice to the needs of commerce.

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### First Three-Day Law School Institute a Pronounced Success

The University of Michigan Law School's legal institute, held on the campus at Ann Arbor on June 22, 23 and 24, proved such a decided success that it has opened up new possibilities for lawyers who want to go back to school. The Michigan institute marks a new stage in the development of advanced legal education and points a new path for the program which has been actively fostered by the American Bar Association for the past two years. For the first time a law school has taken the initiative in inviting lawyers back to the campus for three full days of work, and the fact that one hundred and sixty members of the bar responded to this call and registered at the Michigan institute is ample evidence of the success of the idea.

Three subjects were covered: The Drafting of Wills and Trusts, by Professor Simes; the Wagner Act and Labor Relations, by Professor Russell A. Smith and Mr. Albert E. Meeder; and Taxation, by Dean E. Blythe Stason, Professor Paul G. Kauper, and Morrison Shafroth.

# OUR NEW SECTION OF TAXATION

By George Maurice Morris
*Chairman Section of Taxation*

RESPONDING to the growing interest of the bar in the legal aspects of taxation in the international, state and local areas, as well as in the national field, the Association at its San Francisco meeting in July created the Section of Taxation. This Section was a logical outgrowth of the semi-annual gatherings called "tax clinics" held under the auspices of the Association's Committee on Federal Taxation. Topics discussed at such clinics have at times included subjects within the state and local fields as well as those in the Federal field of taxation. Several hundred persons have attended each of these clinics at the annual meeting in recent years. A desire to give these persons and members of the Association similarly interested an opportunity for actual participation in determining policies and personnel of the group charged with developing Association activity in tax matters has produced a natural evolution from Committee to Section.

The jurisdiction of the Section as determined by the representatives of the Section, the Board of Governors and the House of Delegates is, in essence, as follows:

"The subject matter under the Section's jurisdiction shall extend to all taxes and manners of taxation not exclusively assigned * * * to some other Section or to a Committee. The Section may, however, agree to the consideration of tax topics by other Sections of the Association."

These provisions were agreed upon not only to permit the absorption in the Tax Section of tax activities in other Sections, with as little disruption as possible, but also to afford a sufficient elasticity to permit the consideration of tax matters by other Sections when such subject matters were peculiarly a part of the scope of activity in other Sections and where results to be achieved might indicate the wisdom of departure from a wholly logical pattern.

The Section has set up, with the jurisdictions indicated, the following Committees:

1. *Federal Income Taxes.* Covers the federal income, excess profits (including capital stock tax) and unjust enrichment tax field.

2. *Federal Estate and Gift Taxes.* Covers the federal estate and gift tax field.

3. *Federal Excise and Miscellaneous Taxes.* Covers federal excise taxes on sales, excise taxes on facilities, admissions and dues taxes, stamp taxes, processing taxes and all federal taxes not covered by the jurisdictions specifically given to other committees.

4. *Old Age Benefit and Unemployment Insurance Taxes.* Covers federal and, so far as integrated therewith, state, old age benefit and unemployment insurance taxes.

5. *State Taxes.* Covers all state taxes except those integrated with federal taxes or those which are purely local in character.

6. *Local Taxes.* Covers all local taxes except those which are integrated with federal or state taxes.

7. *Co-ordination of Federal, State and Local Taxation.* Covers projects for co-ordinating or resolving conflicts between: (a) federal and state or local taxing systems; (b) state taxing systems and (c) state and local taxing systems.

8. *Advisory Committee to the United States Bureau of the Census.* Serves with at least one member in each state and territory, as an advisor to the Chief Statistician, Division of State and Local Government, Bureau of the Census, with respect to the operation and classification of tax and appropriation laws, regulations and practices in the various states and territories of the United States.

These committee classifications are initial working hypotheses only. Reclassification or subclassification can be undertaken as experience demonstrates the desirability of such courses.

It is expected, at the outset at least, that the activities of the Section and of the committees will be confined largely, if no wholly, to matters of practice, procedure and clarification.

While the character of the first seven Committees is readily indicated, something should be said with respect to the Advisory Committee to the United States Bureau of the Census. The creation of that Committee arose from a request by the Director of the Bureau of the Census for a designation by the American Bar Association of at least one lawyer in each state to whom questions could be referred by the Bureau of the Census in its task of classifying and compiling statistics with reference to the taxing and expenditure systems in each state. This opportunity for cooperation between the bar and an agency of the government, which cooperation should be of value to the government far beyond the burden imposed, was seized upon with alacrity.

The officers and council of the Section are: George M. Morris, Chairman, Washington, D. C.; G. Aaron Youngquist, Vice-Chairman, Minneapolis, Minn.; Weston Vernon, Jr., Secretary, New York City; Louis A. Lecher, Milwaukee, Wisconsin; William A. Sutherland, Atlanta, Georgia; James K. Polk, Jr., New York, New York; William C. Warren, Cleveland Ohio; John B. Milliken, Los Angeles, California; Percy W. Phillips, Washington, D. C.; Thomas C. Lavery, Cincinnati, Ohio; Hon. Robert C. Hendrickson, Woodbury, New Jersey.

It is contemplated that the section will continue the semi-annual clinics so popularly developed by the predecessor Committee on Federal Taxation. At the Section meetings held at the time of the annual meetings of the Association, an added feature will be, of course, reports of Section Committees and the transaction of Section business.

A number of projects are under study by the Section Council. One of these includes an exploration of the possibilities for developing a medium of reporting Section activity, papers and discussions at a minimum of cost to Section members. The experience of other sections of the Association has demonstrated that they often are torn between dividing the meager funds available between what they deem to be the printing and distribution of essential data on the one hand and to the expenses of the meetings and work of Section committees on the other. If the burden of publication costs can be lightened there should be a much better opportunity to make creative Section functions more effective.

A second objective is to evolve a method of research under Section auspices. At present the research activity in the tax field, at least on the part of non-governmental agencies, is largely, if not entirely, devoted to the substantive side of taxation, that is to the yield and social effect of different taxes. Occasionally, perforce, these studies touch upon procedure and practice, but generally inquiries into the "how" of tax administration have been left to tax administration offi-

cials. With an approach from such sources emphasis has naturally been upon the problems as the administrator sees them and not upon the point of view of the taxpayer and his counsel. It is believed that research into methods stimulated by the payer, rather than by the collector, may contribute something to the public welfare.

It is the intention that the Section shall feel its way along in its development rather than set up an elaborate organization which may prove to have been abortive. While the Association's eighteen years of experience with its Committee on Federal Taxation gives a valuable background in the national field, our ventures into the international, state and local areas have been quite limited and have not been through co-ordinated channels. The enthusiastic response from so many members of the Association applying for membership in the Section imposes a responsibility upon the Section officers and Council for the development of programs which is not to be treated lightly.

# JUNIOR BAR NOTES

By Joseph Harrison
*Secretary of the Junior Bar Conference*

WITH the weeks of organizing behind it, the Junior Bar, National and State, has begun to move along to the field of tangible accomplishment.

### Illinois Practice Survey

One of the finest and most concrete contributions to the economic welfare of young lawyers, is a survey of conditions of practice of law in Illinois conducted by a special committee of the Section on Younger Members Activities of the Illinois State Bar Association. The results of the survey have recently been published in a 24 page pamphlet with four pages of supplementary statistical data. The survey, designed to inform young lawyers of practice opportunities throughout Illinois (Cook County excepted), may also be helpful to older practitioners. It analyzes the size, population, economic activities, types of residents and prospects for new lawyers in a total of 99 of the 101 counties in Illinois.

Dedicated principally to the aid of newly or recently admitted members of the bar who seek a place to establish themselves, the Illinois survey may well serve as a model for similar surveys in other States. The Chairman of the Younger Members Section of the Illinois State Bar Association is Amos M. Pinkerton of Taylorville, who is also Illinois State Chairman for the Junior Bar Conference. The special committee on the survey included: Chairman, James P. Economos, Chicago, Conference Council Member from the Seventh Circuit; Secretary, Charles B. Stephens, Springfield; Harper Andrews, Kewanee; Norman P. Jones, Springfield; and Robert W. Williamson, Springfield. The committee had the cooperation of the *Chicago Daily Law Bulletin*. Here is an excellent example of the Junior Bar Conference program (on Aid to Young Lawyers) being carried out within a State wherein Conference officers and members also play a leading part in State Bar matters.

### The Colorado Springs Meetings

The annual meeting of the Colorado Junior Bar Conference was held on September 23, 1939, at Colorado Springs in conjunction with the annual meeting of the Colorado Bar Association. Hubert D. Henry, Denver, former Secretary, was elected State Chairman; Leo S. Altman, Pueblo, Vice-Chairman, and John W. O'Hagan, Greeley, Secretary. Speakers on the program were Paul F. Hannah, Washington, D. C., Conference Chairman; A. Pratt Kesler, Salt Lake City, Conference Vice-Chairman; James D. Fellers, Oklahoma City, Council Member from the Tenth Circuit, and John Hunt, Topeka, Kansas. Mr. Kesler spoke on the need of solidarity of the bar, Mr. Fellers on the Conference program for the current year and Mr. Hunt on Junior Bar work in States where the State Conference unit system is in operation.

The business of the meeting, conducted by retiring Chairman Mark Harrington, Denver, shows some fine results for the Colorado unit's efforts during the past year. Plans for collaborating with the Colorado Bar Association in public information work were presented by William Hedges Robinson, Jr., Denver. Recommendations were also made for changes in methods of judicial selection and tenure by the Committee on Judicial Selection through Jack Ramsay Harris of Denver. The Committee to Sponsor Newly Admitted Members, headed by Norman E. Bradley, Denver, reported it was preparing to provide to first-year lawyers, if desired, the aid of older practitioners as sponsors. These would make themselves available for consultations by the new men on practical problems confronting a new attorney. Pursuant to suggestions of the Committee on Program Suggestions, of which Douglas McHendrie, Denver, is Chairman, Committees on Placements and on Economic Survey were appointed. Harlan Howlett, Boulder, Chairman of the latter committee advised that the survey would be commenced as soon as funds were available.

In connection with the Colorado Junior Bar's meeting, a regional meeting was held by the officers and members of the Conference from the States of Colorado, Wyoming, New Mexico, Utah, Kansas and Oklahoma, all in the Tenth Federal Judicial Circuit. Attended by representatives from every State in the Circuit who on the average traveled at their own expense more than 1,200 miles apiece to and from Colorado Springs, it was devoted to an outline of Committee work by Frank Eckdall, Emporia, Kansas, Chairman of the Committee on Relations with Law Students; Philip H. Lewis, Topeka, Kansas, Chairman of the Committee on Cooperation with Junior Bar Groups, and Mr. Harrington, Chairman of the Committee on the Economic Condition of the Bar. Outlines of plans for activity in each State were presented by the State Chairman or his representative; and a general discussion was had as to methods and techniques of carrying out the work.

On Sunday, September 24, the Conference members who could stay over attended the regional con-

ference sponsored by the Section of Bar Organization Activities.

Junior Bar members also participated in the program of the Colorado Bar Association and heard the address of President Charles A. Beardsley, who spoke on the subject of the duty of the bench and bar in face of the challenges implicit in the present war crisis.

### Chairman Hannah on Tour

The Colorado meeting offered an excellent opportunity for Conference Chairman Hannah to make ten stop-overs en route to and returning from Colorado Springs. This enabled him to confer with field workers, particularly State Chairmen, regarding program and methods for executing it.

Visits were made at Louisville, Ky., St. Louis, Mo., Dallas, Texas, Colorado Springs, Colorado, Omaha, Nebr., Des Moines, Ia., Chicago, Ill., Indianapolis, Ind., Columbus, Ohio and Cleveland, Ohio.

Mr. Hannah was warmly received at these various localities and was impressed with the enthusiasm shown for the Conference and its program in several States where there has been a noticeable lack of interest.

At Louisville, the Conference Chairman was fêted by Watson Clay, State Chairman and fifteen Junior Bar leaders at a dinner at the Pendennis Club. Frank Drake, member of the House of Delegates, also addressed the group. Mr. Hannah outlined the Conference program and answered many questions. Ways and means for furthering the program were discussed. Mr. Watson has already published the first issue of the "Junior Bar Conference Jolt," the first local Conference publication.

Former Chairman Ronald J. Foulis, John Gilchrist, Allan Goodloe and Burton Phillips met with Hannah at St. Louis, Mo., on September 19th. Plans for legal institutes, extensive speaking campaigns, aid to law students, and assistance to judges in naturalization ceremonies were formulated at the meeting. The Missouri Junior Bar conducts a weekly radio program at Station KSD.

Moving on to Dallas on September 20th, Mr. Hannah received a hearty Texas reception which lasted from 7:00 A. M. until 9:15 P. M. State Chairman William Carssow, former Conference Vice Chairman Lavergne Guinn and Mrs. Guinn, Samuel French, President of the Dallas Junior Bar Association, William Burrow and sixty-five other members of the Conference participated in the welcoming luncheon and in talks about the Conference program. Leaders of the Texas Junior Bar Conference and Hannah also discussed radio possibilities centering around the Public Information Program with Mr. Forrest W. Clough, Educational Director of the Texas Network with twenty-four stations. "Texas has come alive!" writes the Chairman. Before leaving Dallas, Hannah also met Trueman O'Quinn, President of the State Bar Junior Section who promised full support to the Conference program in his State.

Returning from Colorado Springs, the Chairman's first stop was at Omaha. Here he met with State Chairman Paul Miller, who travelled 500 miles from Scottsbluff, Charles Ledwith, Public Information Director and Donald Sampson, State Membership Chairman, who came from Lincoln and Central City, respectively, for a discussion of Conference problems. The meeting was held at the offices of Edward Sklenicka, President of the Omaha Barristers. This was followed by a luncheon at which a larger group assembled. Mr. Ledwith reported that the Lincoln Barristers Club had voted full cooperation with the Conference.

At Des Moines, Iowa State Chairman Kenneth Neu, Owen Cunningham, one of the Conference founders, James Irish, President of the Des Moines Junior Bar Association, Wayne Kemmerer, State Public Information Director and Jesse I. Miller, Iowa State Delegate of the American Bar Association, greeted the Conference Chairman, discussed plans for accomplishments this year and promised a good account for the State.

Chicago and Indianapolis were both covered by the Conference's "Ambassador of Activity" on September 27th. James P. Economos, Francis P. Linneman and Joseph C. Lamy reviewed the Conference situation in Illinois and the Seventh Circuit at the Chicago visit. Mr. and Mrs. Harold Bredell did the honors at Indianapolis. Proceeding to Columbus, Ohio, where a morning meeting was scheduled, Mr. Hannah met with John Bartram, President of the Junior Section of the Ohio State Bar Association; Clark Morrow, Conference State Chairman; Bartley Arnold, State Public Information Director, and Earl Morris, former Council member and a number of others. A program for Ohio was planned and will be presented at the annual meeting of the Ohio Junior Bar on October 19th.

James A. Gleason, State Membership Chairman, Harry Green and President Barkdull, of the Ohio State Bar Association, welcomed the Junior Bar's Marco Polo at Cleveland. Later a reception was tendered him by members of the Cleveland bar.

In his report to the Council of the Conference, Chairman Hannah writes:

"It is impossible to indicate in a letter the inspiration which the writer derived from his trip. Everywhere I went I was treated with the utmost hospitality and courtesy; but more than this, there were positive proofs of tremendous interest and enthusiasm for the Junior Bar and its activities, a desire to "do something," and general agreement that the Conference was the agency to lead the young lawyers into Canaan. Never has the writer had the feeling so strongly impressed upon him that the young bar is "on the march." The meetings were successful not because of the presence of the Chairman, but rather because his visit provided a rallying point."

### Other Activities

Activities in many sections not visited by the Chairman were also apparent from reports received by the Secretary. New Jersey, Vermont, Massachusetts, Arizona, and others show they are "on the march" also. A full account of developments in these States and in the Public Information Program will appear in the next issue of the JOURNAL.

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
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## THE FIRST YEAR OF THE NEW FEDERAL PROCEDURE

The Federal Rules of Civil Procedure have now been in effect for a little more than a year.

It was clearly foreseen that the success or failure of that great reform would probably be determined by the manner in which it was administered by the judges of the District Courts of the United States.

The memory of the extent to which the Field Code was crippled, and in some jurisdictions well nigh destroyed by judicial hostility, was until recently a source of anxiety lest a like fate should overtake the new effort to simplify court procedure. It has now become abundantly clear that the judges themselves have removed all apprehensions of that sort.

There has been manifested an unexpected degree of unanimity on the part of the courts in the interpretation and administration of the rules. This may be attributable to three main causes.

Probably the first of these is the fact that the district judges have had full opportunity during the progress of the drafting of rules, to make known their views in regard to the methods of procedure to be adopted. Both by communications from judges and through the reports of their local committees, the courts and the practitioner participated in the formulation of the new system.

All these considerations work together to produce a desire on the part of the trial judges to accommodate themselves to the Supreme Court rules and to make the new system work.

The second of these causes of uniformity may be attributable to the fact that the rules are promulgated by the Supreme Court of the United States. The judges of the District Courts have been guided by the exercise of its rule making power from the very beginning of our federal system as to their procedure in cases in equity, admiralty, bankruptcy and every other kind of court procedure except in common law cases. Almost unanimously they prefer to have their procedure regulated by the judicial department rather than by the legislative department. There is also an almost conclusive presumption of the validity of Supreme Court rules which might not obtain if the same provisions had been enacted in statutory form under legislative authority.

A third contributing cause of the remarkable unanimity may be attributed to the action taken to make the bench and bar currently advised of all the decisions on the new procedure. To accomplish that purpose Attorney General Cummings undertook to assemble all those decisions and send them to every federal judge and district attorney at frequent intervals in bulletins containing an abstract of the decisions and quotations from the opinions. To this important task he assigned Assistant Attorney General Alexander Holtzoff and equipped him with adequate facilities. This important project was continued by Attorney General Murphy.

The first year's decisions occupy 45 issues of the bulletins. The headnotes of those bulletins have been reprinted in the JOURNAL. The value of this service to the practising lawyer has been evidenced by many letters from our readers. It is evidenced also by the extent to which the same service is being undertaken by law publishers, reporter systems and text book writers.

A plan has been approved and is near completion to make available in the near future a review of the first year's decision in more complete and convenient form. It is expected that an announcement will be made in our next issue, which will be of special interest to all who practice in the Federal courts.

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## ACHIEVEMENTS OF THE AMERICAN BAR ASSOCIATION

We begin publication in this issue of Professor Max Radin's "Achievements of the American Bar Association." The title sufficiently indicates the character and contents of the work; it also differentiates it from what

might be termed a general history of the Association, which would tell the story with more detail, greater attention to the outstanding personalities who have furnished leadership, and with special regard to chronological sequences.

As Professor Radin puts it in his summing up at the end, "the record of its accomplishments as presented in the foregoing pages gives only certain high points, a number of definite activities of larger than ordinary import in which the Bar Association has improved the situation in the country as far as the administration and the formulation of law are concerned and as far as the relation of the profession of law to the public is concerned. It is a notable record and one that may be viewed by lawyers with legitimate satisfaction."

But Professor Radin realizes that a mere record of notable concrete performances does not tell the whole story of an institution. Its history may have generated intangibles of lasting value, in public, professional and private attitudes, that are not easily defined but are none the less of supreme importance.

No doubt it was with this idea of the historical inadequacy of the merely concrete achievement in mind that he turned in his summary from "the specific results" of the Association's activity to a general one that, as he says, is apt to be forgotten. This is the fact that "the American Bar Association in its meetings and in the meetings of its affiliated and associated legal organizations has become something of a forum in which those ideas in law and in social and economic reform or change that have been agitating the community might be discussed. . The Association . . may justly claim the credit of having given a hearing to views and doctrines that profoundly shocked a great many of its members." He continues:

"This, it may be fairly urged, is an accomplishment of no mean value. The administration of the affairs of government in all its branches and in all its aspects will always involve the assistance of lawyers. The existence of a great and semi-public body in which every conceivable doctrine may be formally presented and discussed will prevent lawyers from living in a segregated and unreal world, a world that could well be the result of a purely technical and professional body meeting behind closed doors and canvassing only the technical problems of its own practice."

Professor Radin is too well known to the profession in this country for anyone to question the conditions under which he undertook the task. There were no conditions. All the available material was placed at his disposal and his work is the result of his own estimate of its significance. It is hoped that the occasional illustrations, for which he is not responsible, may also be found of interest by the reader.

## CHIEF JUSTICE RYAN'S PRAYER

CHIEF JUSTICE JOHN B. WINSLOW in his Story of a Great Court, says of his predecessor, Chief Justice Edward George Ryan (p. 313): "He also made practical application of his belief in the Christian religion by prayer. I know this from having found among his papers, which were kindly placed at my disposal, a manuscript prayer, much worn and in his own handwriting, which I believe to be original and evidently prepared by him for daily use after he came to the bench. Its beauty and simple pathos should give it a place in any liturgy. I cannot forbear quoting it in full:

"'O God of all truth, knowledge and judgment, without whom nothing is true or wise or just, Look down with mercy upon Thy servants whom thou sufferest to sit in earthly seats of judgment to administer Thy justice to Thy people. Enlighten their ignorance and inspire them with Thy judgments. Grant them grace truly and impartially to administer Thy justice and to maintain Thy truth to the glory of Thy name. And of Thy infinite mercy so direct and dispose *my* heart that I may this day fulfill all my duty in Thy fear, and fall into no error of judgment. Give me grace to bear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I be not misled by my wilfullness, vanity or egotism. Of myself I humbly acknowledge my own unfitness and unworthiness in Thy sight, and without Thy gracious guidance I can do nothing right. Have mercy upon me a poor, weak, frail sinner, groping in the dark; and give me grace so to judge others now, that I may not myself be judged when Thou comest to judge the world with Thy truth. Grant my prayer I beseech Thee for the love of Thy son, our Savior, Jesus Christ. Amen.'"

## ARTICLES IN THE JOURNAL

As it is the policy of the JOURNAL to provide, within practicable limits of space, a forum for the free expression of the views of members of the Association on matters of importance to the profession and the public, and as a wide range of opinion elicits a representative expression of the varying views, the Association and the Board of Editors of its JOURNAL assume no responsibility for the views stated in signed articles, beyond expressing by the fact of publication a judgment that the contents of the article merit consideration by our readers.

Editorially the JOURNAL supports the policies and objectives of the Association as from time to time duly determined. The views expressed are not necessarily those of each member of the Board of Editors.

# SELECTED ESSAYS SUBMITTED IN 1939 ROSS ESSAY CONTEST: A SYMPOSIUM

## SUBJECT: "TO WHAT EXTENT SHOULD THE DECISIONS OF ADMINISTRATIVE BODIES BE REVIEWABLE BY THE COURTS?

### V. ESSAY SUBMITTED BY MR. WATSON CLAY*

IT has been observed, somewhat reluctantly, that "Law and all law, religious, political and industrial, lags behind all other institutions in the onward march of civilization."[1] Perhaps the writer did not recognize that this is necessarily true. Law is remedial in nature, and follows in the wake of the social impulses of a people. It is also necessarily true that the courts, engaged in the orderly determination of rights created thereunder, must follow the law.

Legislatures attempt to keep pace with the social impulse. Complexities of modern civilization demand speed and specialization in the execution of certain new laws asserting particular public policies. Since courts are not constituted to fit that exact demand, administrative bodies have come into prominence.

Created as a matter of expediency or necessity,[2] their development has been haphazard because of difficulties in assigning them a proper province in our system of government. Their actions have been subject to rigid and often unsympathetic judicial review.

The reason is plain. The administrative body is an agency of government created to carry out legislative ends. In one sense it represents the public interest. The courts, among other duties, are charged with the protection of individual right. There may be conflict. Every law passed for the general good affects or impairs pre-existing private rights. Under our constitutional form of government these merit recognition, regardless of the nature or form of assault.

We may therefore assume the necessity, in some instances, for judicial review of administrative action. Recognizing confusion in legal decisions and private theory, the purpose of this paper is to discuss certain principles that should govern the extent of that review.

I. *The Nature and Function of Administrative Bodies*

The administrative tribunal has been created and developed because of a public need for a supplemental agency of government capable of assisting in the application and execution of particular laws.[3] It is not recognized in the Federal or State Constitutions as a separate branch of government.[4]

Regardless of descriptive phraseology it is a new and distinct agency.[5] Numerous such bodies exist, and under the prevailing philosophy of government more will be created as the need arises.

In appraising the proper position of the administrative body and its relation to the courts, we are primarily interested in its function. That function is to determine special facts controlling the application of particular laws. Distinguishing characteristics are (1) speedy if not summary action, and (2) expert investigation and determination.

Court procedure is relatively stiff and slow. On the other hand, the administrative body is (or should be) equipped with personnel and facilities which may be adapted to relatively rapid solutions of special social problems.

While no court has been known to balk at complexities,[6] certain laws in application or enforcement require expert investigation, regulation, and decision. The administrative tribunal, fulfilling its purpose, is fitted out to furnish a *specialized service.*

Numberless questions have been asked and answered as to whether or not this agency acts in an executive, legislative, or judicial capacity. A good answer is that it acts in all three capacities,[7] separately or together, depending upon its particular function and method of procedure. The almost classical assumption that a Commission in fixing a rate discharges a legislative function[8] is only partially true, for in fact such

*EDITOR'S NOTE: As announced in the June issue of the Journal, we publish herewith one of the essays submitted in the Erskine M. Ross Essay Competition—an essay which was not awarded the prize but is deemed to be of a high standard of excellence and effectiveness. In publishing several essays in addition to the winning essay (which was in our June issue), no attempt has been made to select or rate the others in any order of relative merit. They have been selected for the reason that they are deemed worthy of inclusion in a symposium representative of varying views on the subject. The author of the essay published in this issue is Mr. Watson Clay, a member of the Bar of Louisville, Ky.

1. F. W. H. Clay, The Modern Machvellianism, p. 27.
2. See Ray A. Brown, Administrative Commissions and the Judicial Power, 19 Minn. L. Rev. 261.
3. See excellent article tracing administrative development, by Arthur T. Vanderbilt, The Place of the Administrative Tribunal in our Legal System, 24 A.B.A. Jour. 267.
4. Some state constitutions do, however, create or provide for the creation of particular administrative bodies. See, for example, Section 209, Constitution of Kentucky (1891), providing for a Railroad Commission.
5. Ray A. Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation, 38 Har. L. Rev. 141, 152.
6. See interesting statement of Canty, J., declaring the incompetency of judges in passing on the reasonableness of railroad rates; after which he proceeds to go head over heels into a most exhaustive analysis of most complex evidence, in Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N.W. 713 (1897).
7. Strangely, the "forbidden commingling of essentially different powers of government in the same hands" is said to be "the indentifying badge of an administrative agency." Report of A.B.A. Special Committee on Administrative Law, 1937, p. 216.
8. Prentis v. Atlantic Coast Line, 211 U. S. 210, 226 (1908); Wadley Sou. Ry. Co. v. Georgia, 235 U. S. 651, 660 (1915).

Commissions act in many respects judicially.[9]

Attempts to tie administrative action into one of our three established branches of government has resulted in confusion.[10] Perhaps we should eliminate this problem by simply declaring that administrative bodies act administratively,[11] thereby recognizing that their labors merit some mark of distinction. It is submitted that type description of administrative action should not control the scope of judicial review.[12]

Considering the function of the administrative body we may well bear in mind that it furnishes a "prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[13]

Judicial review should, as far as possible, permit the effective utilization of such method.

II. *The Nature and Function of the Courts*

It is unnecessary to trace the history of courts. Originally they were gardens of kings wherein mythically bubbled the fountains of justice.[14] In any civilized society it is necessary that there exist some place or institution where questions of conflicting right may be decided and decisions enforced.

Drawing heavily on Coke and Blackstone, we may say that a court is an institution of government where justice is judicially administered.[15] By judicially administered we mean according to law.

Any definition of a court must include the concept of the exercise of judicial power. This is, in substance, the power to decide and carry into effect a judgment between parties.[16] Some say its essence is to decide.[17] Others say its prime aspect is the enforcement of judgments.[18] Surely it is a combination of both features.

This power is lodged under constitutional authority in the judicial departments of our governments. It is sufficiently broad in scope to cover private, executive or legislative acts. Certainly it carries over into the administrative province.

Under a "government of laws and not of men"[19] courts must maintain integrity[20] and independence[21] in fulfilling their duties as the supreme arbiters of legal right. Under our constitutions no organ of government can escape some judicial review in proper cases. It has been pointed out that this constant threat should result, not in impairment of administrative action, but in improvement of it.[22]

9. See article in Note 5 at PP. 150-152; Lawrence Curtis, Judicial Review of Commission, 34 Har. L. Rev. 862, 878.

10. See Warren H. Pillsbury, Administrative Tribunals, 36 Har. L. Rev. 405.

11. This term is, of course, utterly meaningless except for descriptive purposes, even though courts have sometimes used it as if it had some independent force.

12. For the different view, see Albert Smith Faught, Judicial Review of Administrative Agencies, 24 A.B.A. Jour. P. 897.

13. Opinion by Chief Justice Hughes in Crowell v. Benson, 285 U. S. 22 (1932) at P. 46.

14. In re Steele, 156 Fed. 853, 856 (1907).

15. 3 Blackstone's Commentaries, 24.

16. Miller on the Constitution, 314; Board v. McKnight, 111 Tex. 82, 229 S.W. 301, 304 (1921).

17. See article in Note 2, at P. 274.

18. See Warren H. Pillsbury, Administrative Tribunals, 36 Har. L. Rev. 405, 412-15.

19. Massachusetts Bill of Rights—quoted in Yick Wo v. Hopkins, 118 U. S. 356, 370 (1886).

20. The Federalist, No. 78. See Samuel C. Wiel, Administrative Finality, 38 Har. L. Rev. 447, 479-81.

21. O'Donoghue v. United States, 289 U. S. 516, 530, 531 (1933); Cuthbert W. Pound, The Judicial Power, 35 Har. L. Rev. 787, 795.

22. Hearings before U. S. Senate sub-committee of the Committee on the Judiciary, April 1 and 5, 1938, P. 58.

WATSON CLAY

III. *The Correlation of Administrative and Court Action*

Considering actualities, we are faced with the existence of a distinct governmental agency lawfully endowed with functions which result in the appraisal and determination of private and public right.[23] On the other hand, our governments provide an independent judiciary with full power and ultimate authority to effectuate and enforce those rights. There exists no inconsistency between the efficiency of the former and the control of the latter. It has been authoritatively recognized that "Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."[24] Common sense demands cooperation to the end that the best public interests may be served.[25]

It is submitted that we may, under general rules, outline certain fundamental principles which should govern the scope of judicial review of administrative action. It is entirely possible under our existing system to adopt limitations which (1) will permit us to utilize the expert services of administrative bodies, and (2) will not violate constitutional principles or impair the power of courts.

While considering these principles we should bear in mind that "the limitations upon the reviewing power

23. For examples of the extensive power wielded by administrative bodies today, see Arthur A. Ballantine, Administrative Agencies and the Law, 24 A.B.A. Jour. 109.

24. Chief Justice Hughes' opinion, St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 53 (1936).

25. Compare with correlation of law and equity. See Thurman W. Arnold, Trial by Combat and the New Deal, 47 Har. L. Rev. 913, 940.

of the courts are and must be, in the last analysis, self imposed ones."[26]

### IV. *Constitutional Limitations Upon Administrative Action*

Constitutional limitations (as interpreted by the courts, of course) specifically limit the possible powers of administrative bodies. While judicial review should allow ample room for administrative operations, it may not ignore the mandates of fundamental law.

The following constitutional provisions restrict the exercise of administrative power and must control the extent of judicial review:

(1) The separation of the powers of government into three independent departments, executive, legislative, and judicial, under the Federal Constitution[27] and the State Constitutions.[28]

(2) Amendment V, Federal Constitution, which provides (in part): "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation," and similar state constitutional provisions.

(3) Amendment XIV, Federal Constitution, which provides (in part): "No state shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(4) Provisions in state constitutions which prohibit the exercise of arbitrary power (and substantially sum up the foregoing limitations) such as found in the Constitution of Kentucky (1891): "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."[29]

There are, of course, other constitutional provisions which might be invoked, such as the right to trial by jury,[30] but the four limitations above substantially cover all fundamental constitutional rights which might be asserted.

The courts have progressively adopted a more liberal construction of the separation-of-powers limitation insofar as administrative agencies are concerned,[31] and the Federal Constitution does not prohibit the states from mixing up their own powers of government.[32] Although the delegation-of-power question seems to be raised with the creation of each new administrative body, and though its implied prohibition is still a fundamental theory deserving recognition,[33] the lawful existence of administrative agencies is and should be recognized.[34]

Whether or not a statute improperly delegates executive, legislative or judicial power to an administrative body is after all a question of the statute's constitutional validity and does not go directly to the administrative decision.[35] Insofar as the expeditious finding of facts is concerned, there is little likelihood of administrative action which would violate the first above-mentioned constitutional limitation. Unauthorized attempts conclusively to determine facts or to enforce its own administrative decision would result in prohibited invasion of the judicial realm, but as we will note hereafter such action doubtless would be beyond its *jurisdiction* and subject to judicial review on that ground.

Constitutional limitations (2) and (3) above-mentioned are similar principles applicable to both Federal and State action. No Federal[36] or State[37] agency may be empowered to or may determine finally rights of life, liberty or property except in accordance with the dictates of "due process." We will note hereafter that the requirement of due process of law has both (1) a procedural and (2) a substantive aspect. Conformity thereto presents questions which call for judicial review.

Limitation (4) above, as suggested, sums up the other constitutional limitations. Specifically set out in some state constitutions, this principle underlies the Federal Constitution.[38] Alleged exercise of arbitrary power calls for court judgment.

With this brief background of limitations in mind, let us proceed to consider in what instances and to what extent judicial review of administrative action is necessary and proper. Our focal points will be the absence of authority and the abuse of it.[39]

### V. *Questions of Jurisdiction*

With rare exception, the administrative body is a creature of the legislature, state or Federal.[40] It is created for a *particular purpose* and endowed with *particular power*. It does not exist apart from these. Were there no constitutional restrictions, it seems clear any act of an administrative body not authorized (expressly or impliedly) by its creator would be ineffective. In the light of constitutional restriction, exercise of unauthorized power would violate the "due process" limitation insofar as it would not be in accordance with the law of the land.[41] It would likewise violate the prohibition against the exercise of arbitrary power, as the acts of an administrative agency must be justified by some law.[42]

The sphere of administrative authority is a question of *jurisdiction*. While a precise and utterly accurate definition of this term is perhaps impossible, we may attempt to affix some meaning to it. It has been stated that: "Jurisdiction is simply power."[43] Acknowledging a source, we may refer to it as *prescribed power*.

26. Professor Powell in 1 Am. Pol. Sc. Rev. 592.

27. Article I, Section 1, Article II, Section 1, Article III, Section 1, Constitution of the United States.

28. See State Constitutions, particularly Constitution of Alabama (1901), Sections 42 and 43, and Massachusetts Constitution (1779), Part I, Article 30.

29. Section 2.

30. Insofar as administrative action is concerned, this right has been consistently denied.

31. Fong Yue Ting v. United States, 149 U. S. 698, 714 (1893); See Article in Note 18, at PP. 424, 425.

32. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 552 (1908); Highlands Farm Dairy, Inc. v. Agnew, 300 U. S. 608, 612 (1936).

33. See case cited in Note 21, at P. 530.

34. See article in Note 10, at PP. 424, 425.

35. See for example Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); and Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

36. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52 (1936).

37. Southern Ry. Co. v. Virginia, 290 U. S. 190, 196 (1933).

38. Interstate Commerce Commission v. L. & N. Ry. Co., 227 U. S. 88, 91 (1913); Jones v. Securities Commission, 298 U. S 1, 24 (1936).—"There is no place in our constitutional system for the exercise of arbitrary power"—Mr. Justice Day in Garfield v. Goldsby, 211 U. S. 249, 262 (1908).

39. See article in Note 20, at P. 463.

40. It has been mentioned heretofore that some state constitutions provide for the creation of or create particular administrative agencies. Principles of jurisdiction would not be affected by the source of authority.

41. This is certainly an element of due process. French v. Barber Asphalt Paving Co., 181 U. S. 324, 330 (1901).

42. See American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108 (1902).

43. Johnson v. McKinnon, 54 Fla. 271, 45 So. 23, 25 (1907).

The concept of jurisdiction must not be confused with other legal questions. Administrative power is the prescribed field of operations. It does not affect particular acts or decisions within the field.[44] As pertinently remarked: "Jurisdiction is the power to decide —wrong as well as right."[45]

In discussing a program of judicial review we must clarify our understanding of terms as much as possible. It may prove useful in this analysis if we confine ourselves to the phase of jurisdiction based upon particular grants of power.

In order to fix our meaning, suppose we examine certain language used by Mr. Justice Lamar in Interstate Commerce Commission v. Louisville & Nashville Railroad Co.[46] It is as follows: "But the legal effect of evidence is a question of law. A finding without evidence *is beyond the power of the Commission.*"[47]

Acceptance of this conclusion at its face value would throw us into unending confusion. The question of evidence may certainly be a question of law, but is it a question of "the scope of the authority validly conferred"?[48]

Where an administrative body is created and granted authority to make findings with respect to a particular subject matter, the basis of the finding is hardly a question of power. The agency must be accorded some freedom within the ambit of its authority. Conceding mistake or violation of other legal principles, it still may be acting within its designated field of operations. A judicial attitude which takes for its premise the proposition that an administrative body has no *power* to reach an erroneous conclusion would leave unlimited the scope of judicial review.

There is confusion on another front. It concerns itself with the so-called "jurisdictional fact," which has lead the courts into almost every conceivable type of decision.[49] No authoritative principle seems yet to have been evolved.

Let us briefly examine three decisions of the Supreme Court of the United States in an attempt to expose the underlying elements of true administrative jurisdiction.

In United States v. Ju Toy[50] the appellee was refused entrance into this country by the local collector at San Francisco. The action of the administrative officer was taken under a Congressional Act providing for the exclusion of Chinese laborers. The Act declared, among other things, that "in every case where an *alien* is excluded, the decision of the appropriate immigration or customs officers * * * shall be final."[51] Ju Toy claimed that he was an American citizen, and consequently not an alien.

The court decided the administrative decision was final and it could not review the order.

Mr. Justice Brewer, in dissent, vigorously attacked the majority opinion. He pointed out that the prescribed authority of the administrative officers related to the exclusion of *aliens*. That is what the Act said. The rules of the Secretary of Commerce admitted it. The collector had no *power* to deport citizens. A question of jurisdiction was presented.

Seventeen years later the same court, in an opinion by Mr. Justice Brandeis, delivered itself of the following: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."[52]

The famous case of Crowell v. Benson[53] invites our attention on this problem. An award had been made by a deputy commissioner under a Congressional Act providing (1) for compensation awards in respect to disability or death resulting "from an injury *occurring upon the navigable waters of the United States;*"[54] (2) that "compensation shall be payable under this act in respect of disability or death of an *employee* * * *."[55]

Suit was brought to enjoin enforcement of the award, principally on the ground that the person to whom the award was made was not complainant's *employee*.

The court decided that the two provisions above quoted were fundamental limitations on the administrative power. The reasons for this determination were two, namely: (1) the Act so provided, (2) the Act must so provide to be constitutional. Again a question of jurisdiction was presented.

While the foregoing cases do not furnish a clear-cut rule, they suggest a line of inquiry which should be of valuable assistance in ascertaining what facts are actually jurisdictional. The following questions should be considered:

(1) Is the subject matter of administrative action under legislative control by virtue of constitutional authority? Thus if the legislature may enact certain laws affecting interstate and foreign commerce,[56] navigable waters,[57] public lands,[58] military status,[59] the bounds of administrative power must be at least the constitutional limit on the legislative action.

(2) What is the specific language used in the statute creating the administrative body? Close analysis of legislative expression should disclose the scope of power. Statutes which provide "if," "when" or "where" a certain fact exists suggest the key to jurisdiction.

(3) What facts is the administrative body created to find? These are usually non-jurisdictional.

(4) Does the statute creating the body assume the existence of a social status or relationship with which the administrative body is to deal? This is usually the jurisdictional fact.

It is obvious that the fact of jurisdiction, consciously or unconsciously, must be passed upon by the administrative body when it assumes to proceed in any case. Such fact should be subject to *independent judicial review*.

The reasons are: (1) Jurisdiction is a question of constitutional or statutory mandate, and is pre-eminently a judicial question. (2) Condemned arbitrary power exists if we acknowledge the right of an

44. See Oklahoma Operating Co. v. Love, 252 U. S. 331, 336 (1920).
45. Armantage v. Superior Court, 1 Cal. App. 130, 81 Pac. 1033, 1034 (1905). In Lange v. Benedict, 73 N. Y. 12, 33 (1878) the following statement appears: "the power to decide protects, though the decision be erroneous."
46. 227 U. S. 88 (1913).
47. At page 92 (Emphasis supplied).
48. Crowell v. Benson, 285 U. S. 22, 54 (footnote) (1932).
49. See Forrest Revere Black, Jurisdictional Fact Theory and Administrative Finality, 22 Cornell L. Quarterly, 344 and 515.
50. 198 U. S. 253 (1905).
51. 28 Stat. 372,390 (Emphasis supplied).
52. Ng Fung Ho v. White, 259 U. S. 276, 284 (1922).
53. 285 U. S. 22 (1932).
54. 33 U. S. C. A. Section 903 (Emphasis supplied).
55. 33 U. S. C. A. Section 903 (Emphasis supplied).
56. Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206, 213 (1938).
57. Crowell v. Benson, just discussed.
58. Smelting Co. v. Kemp, 104 U. S. 636 (1881).
59. Givens v. Zerbst, 255 U. S. 11 (1921); In re Grimely, 137 U. S. 147 (1890).

administrative body to determine finally its own authority. (3) The question of jurisdiction does not require expert or specialized fact finding, but calls for traditionally exercised and experienced judicial judgment.

### VI. *Questions of Procedural Due Process of Law—Notice and Hearing*

Amendments V and XIV to the Federal Constitution prohibit the taking of life, liberty or property without "due process of law." These limitations circumscribe the valid acts of administrative bodies.[60]

The comprehensive import of "due process" has caused some courts to despair of definition.[61] For our purposes an exhaustive definition is not necessary. "Due process" has both a procedural and a substantive aspect, and certain principles underlying each will adequately serve to suggest the scope of judicial review where these constitutional issues are raised.

From a procedural standpoint, this limitation anticipates a proceeding which hears before it condemns and proceeds upon inquiry.[62] Its essential elements involve notice[63] and an opportunity to be heard in an orderly proceeding.[64]

It does not necessarily involve a hearing in a court,[65] although it has been held to require investigation by judicial machinery.[66] (It has heretofore been suggested that all administrative bodies in some respects act judicially.)

The notice and hearing required must, however, be something more than "extra-official or casual notice, or a hearing as a matter of favor or discretion."[67]

From a procedural angle it is difficult to imagine an administrative body passing on the question of whether or not notice and hearing have been afforded, and consequently the courts must here again exercise independent judgment. The question of whether or not such opportunity has been afforded is doubtless a question for the courts because involving the application of constitutional safeguards. Here again we also find the prohibited possibility of arbitrary action unless judicial review may be invoked.

The problem of what we here designate procedural due process presents one of the simplest of legal questions. In most cases the statute creating the agency will adequately provide for procedure before it, and conformity thereto will extinguish the issue.

We note here that judicial review is proper because

(1) the court is fitted by experience to decide the question, and

(2) review does not interfere with the expert investigation by the administrative body.

Insofar as strict procedure is concerned no competent administrative body should ever leave its proceedings open to attack on this ground.[68]

60. See case in Note 37, at P. 198.
61. Jones v. Board of Commissioners, 130 N. C. 451, 42 S.E. 144, 149 (1902); Gaffney v. Jones, 44 Wash. 158, 87 Pac. 114, 116 (1906).
62. Argument of Daniel Webster in Trustees of Dartmouth College v. Woodward, 4 Wheat. 517, at P. 581.
63. Snyder v. Massachusetts, 291 U. S. 97, 105 (1934).
64. Powell v. Alabama, 287 U. S. 45, 68 (1932).
65. United States v. Ju Toy, 198 U. S. 253, 263 (1905). "Due process is not necessarily judicial process." Reetz v. Michigan, 188 U. S. 505, 507 (1903).
66. Chi. M. & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 458 (1890).
67. Coe v. Armour Fertilizer Works, 237 U. S. 413, 424 (1915).
68. See Morgan v. United States, 304 U. S. 1, 22 (1938).

### VII. *Questions of Substantive Due Process of Law*

The legal questions heretofore discussed, i.e., Jurisdiction and Procedural Due Process, require independent judicial judgment to effectuate constitutional provisions as well as to preserve the integrity of the administrative body itself. There are certain other matters warranting judicial review which we may classify under the subject of Substantive Due Process of Law. These concern: (A) the fairness of the hearing,[69] and (B) the evidential basis of decision. Within these particular classifications, weight may be accorded the conclusions of the administrative body, but such conclusions should not be final.

The supreme function of the administrative body is the finding of facts. Since a fact is a conclusion, and not something that exists apart from the mental process,[70] it can be fairly reached only if available proof is heard and its roots are sunk in some evidence of value. To acknowledge the absolute finality of administrative fact-finding in all cases would give the administrative body a position of power yet unoccupied by any other governmental agency.[71]

#### A. *The Fairness of the Hearing*

Due process of law contemplates not only a hearing, but a fair one.[72] One is not heard if his voice is lifted to deaf ears. Consequently before a controverted fact may be fairly found ample opportunity must be permitted a party to make, by evidence and argument, a showing of the propriety or impropriety of the step to be taken.[73] He has the right to know the claims of the opposing party and to meet them.[74] He is entitled to know the evidence to be met and to have the opportunity to test, explain, or refute it.[75]

The principle simply includes "the cherished judicial tradition embodying the basic concepts of fair play."[76] Constitutional guarantees affect hearings before an administrative body the same as before any other tribunal. Consequently judicial review may be invoked if fundamental rights are ignored.

It is submitted, however, that an administrative body has power and right to govern generally the nature and range of its own proceedings. This is an important consideration vitally affecting the rapidity of determinations. The *discretionary control* of proceedings has been[77] and should be recognized in all cases.

The hearing may be considered fair unless the substantial rights of the complaining party have been denied as the result of unreasonable or arbitrary action. An administrative body, as well as a court, is entitled within reason to its own concept of justice.

#### B. *The Evidential Basis of Decision*

Having permitted a fair hearing, the administrative body cannot close its eyes to the proof. It has

69. In Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206, at P. 214, the opinion classifies "the fairness of the hearing" as a part of "procedural due process." For our purpose it is more significant to acknowledge its substantive aspect as opposed to a rule of procedure in order that we may apply a different rule of review.
70. See John Dickinson, Crowell v. Benson—Judicial Review of Administrative Determinations of Constitutional Fact, 80 U. of Pa. L. Rev. 1055, 1074.
71. Interstate Commerce Commission v. L. & N. Ry. Co., 227 U. S. 88, 91 (1913).
72. Kwock Jan Fat v. White, 253 U. S. 454, 464 (1920).
73. New England Divisions case, 261 U. S. 184, 200 (1923).
74. Morgan v. United States, 304 U. S. 1, 18 (1938).
75. See case in Note 71, at P. 93.
76. See case in Note 74, at P. 22.
77. Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206, 215 (1938).

been uniformly held that whether or not an administrative finding is supported by evidence presents a question reviewable by the courts.[78] Adherence to this principle is necessary to curb the exercise of the arbitrary power.

In some cases the statement appears that "any" evidence will support a particular administrative finding.[79] Certainly "any" evidence must mean some evidence of substance. In a recent opinion by Chief Justice Hughes the phrase "if supported by evidence" was construed to mean "substantial" or "relevant" evidence.[80] The finding should not be contrary to the "indisputable character" of the evidence.[81]

It is obvious that in justifying any court review of *evidence* we swing open the door which leads into the innermost recesses of the administrative operation. Under the guise of looking for substantial evidence to support a finding, a court may rake it all over the coals and reach a conclusion contrary to that reached by the administrative body. Such a possibility exists—we are forced to rely upon judicial restraint conforming to more or less settled doctrines.

While a fixed rule of review in this respect cannot be authoritatively laid down, certainly the court should not "pick and choose bits of evidence" to decide contrary to the administrative finding.[82] Nor should it upset such finding if a fair-minded board could reach the conclusion it embodies.[83] There should be certainly a strong presumption in favor of the administrative decision.[84]

In rate cases where confiscation was claimed, the Supreme Court of the United States has recognized a duty to exercise independent judgment on evidence presented in a trial de novo.[85] Such a rule is inconsistent with accepted principles governing the review of evidence in other cases (except in the class with Crowell v. Benson, supra) and should not be followed.[86]

Where an administrative decision results in impairment of private right, regardless of whether the right exists under common law, a constitution, or a statute, review of evidence should be based upon the same tenets in all cases. To adjust its scope according to the height, length or breadth of an asserted right is to defy restriction.

It is true that administrative discretion, either expressly authorized or implied, may differ in various classes of cases. It is also true that the competency of particular bodies may cover a wide range, and the type of question may call for different considerations. These factors will revolve in the judicial mind, consciously or unconsciously.

It is submitted, however, that on the question of evidence the rule of review should be uniform in attaching great weight and a presumption of correctness to all administrative findings of ultimate fact which the agency is created to determine.

### C. *Summary of Substantive Due Process Considerations*

As a summary, we may point out that fairness actually shown in administrative hearings, plus judicial recognition of administrative intelligence and discretion, should greatly aid in the removal of substantive due process questions from the program of judicial review. If the purpose of the administrative body, its special knowledge, and the public interest are constantly kept in mind, review of the nature of the hearing and the evidence there adduced should become less necessary as administrative bodies grow in stature.

## VIII. *So-Called Questions of Law, Discretion, and Fact*

We have heretofore considered three questions which call for judicial examination, namely: (1) Jurisdiction, (2) Procedural Due Process, (3) Substantive Due Process. On the first two judicial judgment should be independent; on the last question great weight and a presumption of correctness should be accorded the administrative decision. The writer believes that this classification adequately designates the necessary or justifiable scope of judicial review.

It is true that scholars and courts have adopted other classifications. Among these are questions of "law," "fact," and "discretion" which present multifarious difficulties.[87] As one writer expressed it: "judicial retreat has been accomplished behind the barbed wire entanglements of the alleged distinctions among questions of 'law,' 'fact,' and 'discretion.' "[88] "Mixed questions of law and fact" have been referred to as rather ingenious devices under cover of which administrative decisions are accepted as final.[89]

We may briefly consider the difficulty experienced in basing judicial review on the determination of whether or not a question presented in one of law or fact. A simple twist of approach may result in either of two entirely different concepts.

In a well known Supreme Court case[90] the Postmaster-General had issued a "fraud order"[91] prohibiting delivery of mail to the complainant upon his finding that it was engaged in promoting a fraudulent scheme through use of the mails. The statute involved[92] authorized the Postmaster-General to do just such a thing upon such a finding. The Court decided that this government official was mistaken as to the *law*, because it could not be construed to mean that complainant's acts were violative of its provisions.

It is difficult to understand why the Court resorted to the argument of statutory misconstruction when it might so easily have stated that there was no evidence to support the finding. The administrative official had not misconstrued the law—his decision simply was not founded upon any evidence of value. At least this is one way to look at it. Twenty years later the same court repudiated the statutory-construction

78. See Florida East Coast Line Ry. Co. v. United States, 234 U. S. 167, 185 (1914).
79. Murdock v. Clark, 53 Fed. (2nd) 155, 156 (1931); Berkman v. Tillinghast, 58 Fed. (2d) 621, 622 (1932).
80. See case in Note 77, at PP. 216, 217; see also Interstate Commerce Commission v. Union Pacific Ry. Co., 222 U. S. 541, 547, 548 (1912).
81. Tang Tun v. Edsell, 223 U. S. 673, 681 (1912).
82. Federal Trade Commission v. Standard Education Society, 302 U. S. 112, 117 (1937).
83. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441 (1903).
84. Darnell v. Edwards, 244 U. S. 564, 569 (1917).
85. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).
86. See Ray A. Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation, 38 Har. L. Rev. 141.
87. For a case of confusion involving all three elements see Bates & Guild Co. v. Payne, 194 U. S. 106 (1904).
88. Nathan Isaacs, Judicial Review of Administrative Findings, 30 Yale L. Jour. 781, 790.
89. E. F. Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 Har. L. Rev. 127, 151.
90. School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902).
91. Page 101.
92. Section 3929, Revised Statutes.

theory of the decision.[93] The true distinguishing feature of the two cases seemed to be: in the first there was no *evidence* of a fraudulent scheme, in the second there was.

These cases indicate that whether a question is one of law or fact depends upon the point of view—i.e. whether we look at the statute first and then at the facts (or absence of them), or vice versa.[94]

Adopting a metaphysical approach, we might say that no statutory provision or other law exists (except as an inactive abstraction) apart from some fact or facts which call it into play. Thus the expressions "reasonable rate," "deficit," "adequacy of service," "injuries arising out of employment," "interstate commerce," or "saline lands" could have no effective legal significance except when it becomes necessary to determine the operation of law upon the facts which demonstrate their existence or non-existence.

It is submitted that uniformity of rule with respect to judicial review requires that the "question of law" criterion be discarded in favor of the "evidence-to-support-the finding" approach. While the result may be the same, the latter rule presents less confusion of both thinking and terms.

It may be noted that a great number of cases put in the "question of law" class are those which involve the problem of *jurisdiction*.[95] Such a legal aspect, as we have pointed out heretofore, is subject to judicial review on that ground.

Likewise questions of so-called "discretion" are in the main questions of *jurisdiction*.[96]

It will thus be seen that so-called questions of "law" or "discretion" come under our headings of either (1) Jurisdiction or (2) Substantive Due Process of Law. If this be true, court consideration of the essential elements of proper review would be aided by the more specific and descriptive classifications.

Questions of fact should take care of themselves. We have, up to this point, provided judicial safeguards for the required protection of individual constitutional and statutory rights. No reason appears why the administrative body should not hold full sway in its rightful realm, i.e. the field of special fact.

Assuming jurisdiction, notice and fair hearing, and some evidence of value (which do not interfere with expeditious fact determination), administrative decisions should be final with respect to facts the agency is created to determine.

The right to find such facts does and should include authority to weigh and evaluate evidence.[97] It also includes the right to reason from subsidiary facts or even to arrive at conclusions inconsistent with those formerly reached.[98]

Unless we would destroy the efficacy of administrative action, review of special fact should not be indulged in, regardless of the type of case. This includes rate-making.[99] Only such a judicial attitude will preserve in the best public interest an institution created because of its assumed competency in the field of fact-finding.

### IX. *Principles of Procedure in Review*

It has been suggested, certainly with justification, that the great variety of methods for review of administrative action[100] has been one of the active causes of confusion of principles applicable in particular cases.[101] Thus collateral attack considerations have figured substantially in rulings which declare the right to a trial de novo.[102]

Inconsistencies of procedural method should be abolished. No reason is apparent why the expense, delay, and confusion of collateral attack should be necessary.

Judicial review cannot be avoided by the failure or refusal of legislatures to provide for it.[103] Surely "plain, speedy, and efficient"[104] remedies by *direct appeal* should be afforded a party whenever he feels himself deprived of legal rights by administrative action.

It would be provident to provide for an interlocutory review of the question of administrative *jurisdiction*, thus obviating full proceedings if the tribunal is undertaking to act without authority. This might prove of especial value where the administrative body undertakes to make rules and regulations, and neither the parties nor the public can afford the delay incident to full hearings on the specific application of such rules and regulations in particular cases.[105]

As before indicated, there seems to be no sound reason for permitting a trial de novo on appeal if there has been an administrative hearing. Even in cases requiring summary action, some sort of record should be made.[106] The right to adduce new evidence before the court where exceptional circumstances warrant it should be provided.

The power of the court to remand to the administrative body for further proceedings should be recognized and exercised where necessary to the best interests of the public and the parties.[107]

Finally it seems that penalties may and perhaps should be imposed upon those parties who exploit judicial review purely for the purpose of delay or for any other obviously non-meritorious purpose.[108]

It is to be borne in mind that the application and development of principles of review are quite largely

93. Leach v. Carlile, 258 U. S. 138 (1922).

94. See Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 583 (1910); in which the opinion by Mr. Justice Holmes refers to the applicable "rule of law" (p. 544), the "power to make the order" (p. 544), but ends up by deciding that the "*grounds* (i.e. facts) do not justify the order" (p. 545). (Emphasis supplied).

95. See E. F. Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 Har. L. Rev. 127, 143-149.

96. See Decatur v. Paulding, 14 Pet. 497 (1840); United States ex rel. Dunlap v. Black, 128 U. S. 40 (1888); Noble v. Union River Logging Ry. Co., 147 U. S. 165 (1893); Brougham v. Blanton Mfg. Co., 249 U. S. 495 (1919).

97. Illinois Central Ry. Co. v. Interstate Commerce Commission, 206 U. S. 441, 466 (1907).

98. Virginian Ry. Co. v. United States, 272 U. S. 658, 665, 666 (1926).

99. See discussion on P. 22, and article in Note 86.

100. See excellent article of E. Blythe Stason, Methods of Judicial Relief from Administrative Action, 24 A.B.A. Jour. 274, analyzing the "battery of methods by which to attack erroneous administrative orders" (p. 274). The American Bar Association is making an intensive study of the various methods of review. See Arthur Smith Faught, Judicial Review of Administrative Agencies, 24 A.B.A. Jour. 897.

101. John Dickinson, Judicial Control of Official Discretion, 22 Amer. Pol. Sc. Rev. 275; Selected Essays on Constitutional Law, Vol. 4, PP. 957, 962, 970.

102. See article in Note 70, at P. 1067.

103. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298, 310, 311 (1913). See article in Note 49, at PP. 366-368.

104. See article in Note 100, at P. 277.

105. See article in Note 25, especially PP. 944, 945.

106. See article in Note 101, at PP. 969, 975.

107. Ford Motor Co. v. National Labor Relations Board, 59 Sup. Ct. 301, 306, 307 (1939).

108. See Section 5, Proposed Administrative Law Bill—S. 915, reprinted in 25 A.B.A. Jour. 116, 118. For type of case which might justify such penalty, see case note, 51 Har. L. Rev. 159.

dependent upon the improvement of administrative competency. Those who clamor against the discomfort of judicial supervision might well see to it that administrative action justifies judicial confidence.

Where jurisdiction is established or admitted, fair and intelligent action on the part of administrative bodies should do much to substantially reduce both the occasions for and extent of review by the courts.

X. *Conclusion*

There is little doubt that the time has come for a complete re-appraisal of the proper relationship between administrative bodies and the courts. Haphazard methods and the varying intensiveness of judicial review have created a wilderness of unsettled rules. There is great need for development of uniform direct appeal procedure and recognition of limits upon the right or duty of courts to supervise administrative decisions.

It is time to lay less emphasis upon the types of administrative bodies and more upon the classes of questions which are presented as a result of their actions. A complaining party is more interested in the right impaired than the particular institution impairing it. For this reason we have considered the extent of review from the standpoint of protected private right rather than from that of executive or legislative prerogative.

There has been designated three classes of questions subject to court review, namely: (1) Jurisdiction, (2) Procedural Due Process of Law, (3) Substantive Due Process of Law. The first two almost necessarily require independent judicial judgment, on the record made before the administrative body except in unusual instances. In the third class of questions the administrative determination should be accorded great respect.

In adopting any classification the writer is aware of "the tyranny of labels.[109] This is impossible to wholly avoid, but principles rather than names should control.

Precisely fixed rules cannot be laid down and would not be exactly followed. Intangible factors are entitled to their interplay. The principles suggested are to serve as guides, not straight-jackets. It is hoped, however, that some uniformity may be achieved both in prescribed procedure for direct appeal, and in recognition of essential factors governing the extent of review.

Our end is the greatest possible benefit which may be realized from the specialized service of the administractive body consistent with adequate protection of fundamental private rights. It is hoped that the scope of judicial review herein suggested may prove a constructive step in the right direction.

109. Snyder v. Massachusetts, 291 U. S. 97, 114 (1934).

# LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

### Constitutionality of New York Law Penalizing Solicitation of Business Sustained

IN the case of People, ex rel Moses v. Adams, decided on October 4, and not yet generally reported, Mr. Justice Bernstein, of the New York Supreme Court, held that a section of the Penal Law of New York forbidding solicitation of, or procuring through solicitation, legal business is valid under the state as well as the federal constitution.

Release on habeas corpus was sought. The statute was attacked upon two grounds:

First, that since it made solicitation of legal business by "any person" criminal, it included a casual solicitation of legal business by an attorney under circumstances where he might ethically make such a request; and, second, that it drew no distinction between recommendation and solicitation nor between proper and improper solicitation, and was, therefore, arbitrary and unreasonable. In passing on these points, Justice Bernstein said, in part:

"Since the relator is not a member of the bar, his contention that the statute constitutes an arbitrary and unnecessary interference with the rights of lawyers to pursue their profession is not in point on this application. If and when the question of the reasonableness of the statute in respect to lawyers arises, this court or our appellate courts may pass upon that contention. For the purposes of the relator's plea, it is only necessary to consider whether, in respect to him, the statute violates any rights or privileges guaranteed by the Federal or State Constitutions.

"Every presumption is in favor of constitutionality and, if the statute can be construed as carrying out the legislative intent constitutionally, it must be so construed: People, etc., v. Ringe, 197 N. Y. 143; People, etc., v. American Socialist Party, 202 App. Div. 640. As the court of appeals expressed it in the Ringe case (p. 150): 'Where a statute admits of two constructions, one of which will make the act in violation of the Constitution and by the other of which the act can be sustained as a proper exercise of legislative power, that construction should be given which assumes that the legislature was mindful of its constitutional limitations, and passed a constitutional and not an unconstitutional act.' Here, the statute was concededly intended to cure the evils of ambulance chasing and, for the purposes of the relator's case, it must properly be limited in its application to ambulance chasing.

"Moreover, the question of unconstitutionality of the statute as to solicitation by a lawyer has already been raised in our courts: People v. Gallerston, 251 App. Div. 607, affirmed without opinion 276 N. Y. 656. While the relator points out that the conviction had in that case, on charges of violation of both section 270 (a) and section 270 (d), might well have been sustained on the basis of the latter section, it is nevertheless true that the unconstitutionality of section 270 (a) was there presented, and that it was there contended, as it is here, that the statute prohibited the mere solicitation of business by a lawyer and that, as such, it had no reasonable relation to the evil of ambulance chasing which the legislature sought to eradicate. Since the identical point was urged on the review of that case, it must be presumed that our appellate courts fully passed upon it. It was also passed upon by the Supreme Court of the United States in a case involving a similar statute, where Mr. Justice Brandeis, speaking for the court, said: 'To prohibit solicitation is to regulate the business, not to prohibit it. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable. The statute is

not open to the objections urged against it'; McCloskey v. Tobin, 252 U. S. 107, 108.

"While the constitutional validity of a law is to be tested, among other things, by what may by its authority be done, it must also be considered in the light of its legislative purpose. Here that purpose was to curb or destroy ambulance chasing. Section 270 (a) is only one of several correlated sections enacted in 1935 to carry out a legislative scheme and must be read and construed with the others. As such it bears a reasonable relation to the condition sought to be remedied. When so read and construed it is obvious that none of the fantastic things, which the relator suggests may be done by its authority, could be done. When so read and construed the section under attack is simply one of a series of regulations enacted by the legislature, under its legitimate exercise of police power, to accomplish a proper purpose and is neither arbitrary nor unreasonable."

### New Jersey Bar Favors Limitation of Admissions

The New Jersey State Bar Association's committee appointed to make a survey of the economic status of the Bar recently announced the results of the answers sent in by 2,386 members of the Bar. The entire membership numbers 7,120. The number that answered is regarded as a high percentage of return on a long questionnaire.

Those lawyers, who favored an admission limitation, were given an opportunity to say how they would effect it. Those who would accomplish it by raising the requirements for admission numbered 1,378. There were 663 votes in favor of limiting admission to 68 per year. Forty lawyers would allow only enough to enter the Bar each year to replace those who had died, retired or resigned. Fifteen favored stopping all admissions. Sixty-eight favored reducing the present membership of the Bar from 7,120 to 5,400. Many, who declined to set a figure, expressed the view that the number admitted should be a certain ratio to the population, some thinking a proper ratio might be one to one thousand.

### New York Court Orders Filing of Contingent Fee Contracts

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, has recently announced a rule requiring attorneys who enter into contingent fee contracts with their clients to file a statement regarding the agreement with the clerk of the court.

The rule, which amends Rule 4-A, reads as follows:

"Every attorney who shall accept a retainer or enter into any agreement express or implied for compensation for service rendered or to be rendered in connection with any such claim or action, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 10 days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, First Judicial Department, a written statement setting forth the date of any such retainer or agreement, of compensation, the name and address of the client and of the attorney, the date and place of the occurrence of the personal injury, and the terms of compensation. *Such statement must be filed personally by the attorney or his representative, or by registered mail.* No attorney shall accept or act under any written retainer or agreement for compensation in which the name of the attorney is left in blank at the time of its execution."

### Bonding of an Attorney May Not Be Advertised

The propriety of an attorney's bonding himself has been much discussed. The Committee on Professional Ethics and Grievances has recently been asked whether an attorney may properly bond himself for the protection of a business forwarder. It advised that there is no ethical objection to an attorney's executing a bond to secure a client or business forwarder, but that he may not give publicity to the fact that he is bonded or that he is willing to furnish the security of a bond. The Committee also advised that it is equally improper for an attorney to permit another to publicize the fact that he is bonded or willing to bond himself.

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,
H. W. ARANT, Chairman

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## ANNOUNCEMENT OF 1940 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

*Subject to be discussed:*

"To What Extent May Courts Under the Rule Making Power Prescribe Rules of Evidence?"

*Time when essay must be submitted:*

On or before February 15, 1940.

*Amount of Prize:*

Three Thousand Dollars.

*Eligibility:*

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with the Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish further information and instructions.

# CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

## Among Recent Books

*GOVERNMENT Corporations and Federal Funds,* by John McDiarmid. 1938. Chicago: University of Chicago Press. Pp. XX, 244.—Here is a timely book concerning itself primarily with the study of the problem of financial management of the thirty-eight great corporations whose stock is owned and whose management is controlled by the federal government under a State charter. The book is a history of this period and makes one see more vividly the changes taking place in our capitalistic system.

Few people are aware of the extent the federal government has gone in curtsying to the sovereignty of the State in the organization and administration of its governmental and proprietary business and in relation to the operation of its corporations. The constitutional and legal questions, such as financial freedom, civil service requirements, the right to sue and be sued, tax immunity, etc., affecting these corporations, are legion.

Mr. McDiarmid, while limiting in general the scope of this work to the problems of financial management of government corporations, nevertheless provides his book with a background by giving the reader an excellent statement and brief discussion of many of the remaining problems besetting these corporations. The highly controversial problem of the extent to which government should undertake activities in which government corporations are found useful is specifically excluded.

Government corporations have been found advantageous in those activities which fall on the border line of business and government. The author, in summing up the advantages and disadvantages, states:

> "On the one hand, it has been declared that the Government corporation is simply a shield for extravagant and irresponsible administration, as well as for corruption. As opposed to this view, other students have been impressed with the greater aggressiveness and efficiency made possible by the use of the corporate device. With a form of organization similar to that of a private company, a governmental enterprise may be conducted along business lines with great dispatch and vigor. Congressional interference in the details of administration is made more difficult, and the way is paved for the removal of the undertaking from political considerations. Flexibility and speed of action are made possible through managerial discretion and the absence of regular governmental procedures and red tape. The right to sue and be sued in the corporate name is enjoyed. Inefficient details of the civil service requirements need not be followed. Finally, the government corporation enjoys a large measure of financial freedom, with many potentially salutary effects." (page 6)

Concluding that a considerable number of the trading and quasi commercial activities of government can best be administered through the corporate device, Mr. McDiarmid poses the problem of financial management. Government corporations must be held adequately responsible for their stewardship of public funds. Too many financial restrictions offset the advantages gained through the use of the corporate device,—"inflexibility is the curse of bureaucracy." How can the government maintain a proper balance between an adequate supervision over public funds on the one hand and maintenance of desired aggressiveness and efficiency on the other? In answering this question, the author analyzes the financial history of all the important federal government corporations, with special emphasis upon the problems of original capitalization, annual appropriations, accumulation of surpluses, accounting, and auditing.

The chapter on the Tennessee Valley Authority is particularly illuminating. Using this analysis as a background, Mr. McDiarmid draws his conclusions in answer to the problem of financial management of government corporations, all of which appear sound.

*Government Corporations and State Law,* by Ruth G. Weintraub. 1939. New York: Columbia University Press.—The author is an instructor in political science, Hunter College. In her own words at the top of page 13: "The purpose of the present study is to analyze only those problems which involve the effect of state law on national government corporations, and the reaction of the latter on state law."

It is shown that a majority of our federal governmental and proprietary corporations were organized by federal officers under the incorporation laws of several of the states and of the District of Columbia, in pursuance of laws of congress authorizing the president to establish governmental agencies.

The question is raised as to what extent these governmental corporations are limited by the laws of the states in which they are incorporated. Briefly, the question is, how far are they subject to taxation and regulation by the states of incorporation and the laws of other states in regard to foreign corporations doing business in these states?

*Taxation.*—The author shows that with few exceptions they ignored the implications of the corporate form and resisted "state taxation in terms of the immunity accorded to the national government itself." They relied upon such decisions of the United States Supreme Court as *Federal Land Bank of New Orleans v. Crosland,* 261 U. S. 374, in which it was held that the bank was not liable for state taxes on registration of its mortgages as distinguished from registration fees to cover reasonable compensation for services rendered.

On the other hand state officials justified taxation of federal governmental corporations by pointing to

such decisions of the court as *South Carolina v. the United States*, 199 U. S. 437 (1905), wherein it was held, as pointed out on page 45, that the national government was denied the right to tax an agency of the state only in those instances when the tax was to be levied on "the means . . . employed by a State, in the discharge of its ordinary functions as a government," as distinguished from proprietary functions. It was argued "that the doctrine of these cases ought to apply reciprocally." The answer of counsel for governmental corporations was, as pointed out on page 46, "that the powers of the national government are limited and that it therefore can not act in a non-governmental way, thereby shedding its tax immunity."

It is pointed out that the United States supreme court decisions to date seem to indicate that these federal government corporations will be protected from state taxation and regulation, except in so far as congress consents. The tendency of state officials and courts, also, is so to rule.

In this connection it is noted that congress is easing the situation by authorizing payments to states, in lieu of taxes lost, in payment for services performed by the state.

It is also noted that practically all of the states, in order to secure the benefits of the New Deal laws applied by many of these governmental corporations, are by their legislatures and officers cooperating with the federal government.

*Taxing the Income of Governmental Corporation Employees.*—It is shown that the decisions of the United States supreme court indicated that the taxation of the income of employees of governmental corporations, state and federal, would depend on whether these corporations were engaged in proprietary as distinguished from purely governmental functions.

However, as pointed out by the author on page 84, the President on April 25, 1938, urged congress to confer "powers on the States with respect to federal salaries and powers to the federal government with respect to State and local government salaries." Since the publication of the book the opinion in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, was handed down on March 27, 1939, from which it appears that, without any express legislative consent, the salaries of state and federal employees are now taxable by the federal and state governments. The opinion points out that in the statute under consideration "Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees."

Former decisions of the court are expressly "overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."

As stated in the concurring opinion of Mr. Justice Frankfurter, the question still remains as to the power of congress, by express legislation, to "relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live."

The author, in accordance with her expressed purpose, discusses problems raised by incorporation of these governmental instrumentalities under state laws and suggests that most of these problems will probably not be settled finally in the courts, but by cooperation between the federal and state governments.

This study is essentially sound. The writer does not explore entirely new territory, though the work is not at all imitative of Mr. McDiarmid's fine book.

A *petitbourgeois* would readily see in Dr. Weintraub's book an alternative to capitalism or a limitation upon individualism, or, probably, whither America?

In the main, subjects are treated with fine regard for the vitality of the facts and the exhaustive research of the writer draws facts from sources surprising in number.

RALPH W. SMITH

Los Angeles, California

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*Chain Stores and Legislation*, compiled by Daniel Bloomfield. 1939. New York: The H. W. Wilson Company. Pp. 466.

*Anti-Chain Store Tax Legislation*, by Maurice W. Lee. 1939. Chicago: University of Chicago Press. Pp. 80.

Mr. Bloomfield, in the past a vigorous antagonist of chain store legislation, has compiled some sixty-three excerpts from newspaper and magazine articles, speeches and governmental reports, in what, in his introduction, he has termed "the most comprehensive source book of materials on the subject now available." He has classified his material into general articles on chain stores, those dealing with taxes, the mortality of retail stores, chain stores and independent stores, supermarkets, voluntary chains, chains and the farmer, chains and monopoly, courts and chain stores, the Robinson-Patman act, and the Patman bill. An appendix contains the texts of act and bill.

That this work was intended to be no contribution to legal literature is apparent from the fact that only one article has its source in a legal publication, and this in the section dealing with courts and chain stores. The companion articles under this topic which have been selected to give a picture of the reception of courts to such legislation have been culled from *The New Republic*, *Journal of Marketing*, and *Journal of Business*, together with the editor's condensation of the opinion of a Pennsylvania county court which declared the chain store tax statute of the state unconstitutional.

In the rear of the book there are included briefs of affirmative and negative arguments on the question of the benefits of chain store distribution, apparently designed for high school debates. Unquestionably the affirmative side need not search far for material in support of their position, but the negative is not quite so fortunate and may be forced to consult other sources.

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Professor Lee in his study of chain stores has limited his work to the tax phases of chain store legislation. The first half of the book is devoted to a compilation of the various State tax statutes, with a brief description of each, together with a rather cursory analysis of five United States supreme court decisions on the subject.

The second half of the book contains a study of the effect and incidence of such taxes. In Chapter IV, devoted to the regulatory effect of chain store taxes, the author devotes ten pages and eight tables to a demonstration of the fact that the normal chain store tax imposes a greater burden upon a sectional chain with many stores in the taxing State, than upon a larger national chain with fewer stores in the State, also the establishing that this is not the result under the present Louisiana statute, a matter very clearly shown in a single sentence reference by Mr. Justice Roberts to the contention of the appellee in *Great At-*

*lantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 422 (1937).

In his scholarly study of the theory of the incidence of chain store taxation, the author shows the possibility of the taxes being shifted back to the producers, shifted forward to the consumers, or being borne by a company's unorganized employees. Unfortunately he has given no indication as to the actual effect upon these groups to date in the twenty-four States having such statutes. He has also failed to give any indication of the connection, if any, between such legislation and the current movement toward concentration of chain stores into super-markets, and the transformation of chain units into voluntary chains through the sale of outlets to managers or other employees.

One unusual element about the study is its relative indifference to other writers in the field. The footnote references to outside articles are confined to six. The value of the work is consequently dependent upon its intrinsic merits rather than as a source of material on the subject. That it is a study well worth the thorough consideration of legislators coming in contact with this type of legislation is indisputable.

J. EDWARD COLLINS
Catholic University of America

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*"The Dallas Bar Speaks,"* a year-book by the officers of the Dallas, Texas, Bar Association. 1939. Dallas: Wilkinson Printing Co. Pp. xiv, 318.—This book covers the activities of the Dallas Bar Association for the year 1938. It contains a detailed summary of those activities which won for the Dallas association the award of merit for outstanding achievement by a local bar association, conferred at the 1939 meeting of the American Bar Association in San Francisco. Although the record of the work of the Dallas bar in 1938 represents outstanding achievements in many different and varied fields, the association very modestly confines this portion of its report to a mere seven pages. Among other things the book contains a total of thirty addresses, all of which were delivered before the Dallas association by various speakers at its meetings during 1938. Included among these speakers are three law school teachers, one college professor, judges of the district and supreme court of Texas, a judge of a United States circuit court of appeals, a United States congressman from Michigan, the secretary of the National Conference of Bar Examiners, and many prominent members of the State as well as the local bar association. In addition to these activities the record also discloses two legal institutes held during 1938, one of three days conducted by Professor W. Barton Leach, of the Harvard Law School, and the other a two day institute conducted by Professor Edson R. Sunderland, of the Michigan Law School. That the social life of the members of the association was not neglected is evidenced by the reports of no less than seven successful balls, banquets, parties and picnics, which were held for the members during the year. The book also contains pictures of all presidents of the association since its organization in 1873, as well as photographs of its present officers and pictures of members who died during the year.

While much of the material contained within this volume is necessarily intended for local interest, the book records a year of outstanding activity which amply justified the action of the American Bar Association in awarding the certificate of merit to the Dallas bar. Executives of State as well as local bar associations, who are seeking to find material with which to build a program for their own associations, can readily find much of value in "The Dallas Bar Speaks."

ROY E. WILLY
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*The International Responsibility of States for Denial of Justice,* by Alwyn V. Freeman. 1938. London and New York: Longmans Green & Co. 623 pp., with appendix of 103 pp.—This book is unusually well documented. The text and notes contain summaries of, or references to, a multitude of cases, including most of the recent ones in this field in Europe and the United States. The work as a whole, aside from comments by the author, appears to be principally a selection and classification of the material on state denial of justice contained in the 66 documents, 109 monographs and law journal articles, and 81 general works in English, French, German, Italian, and Spanish listed in the bibliography. For this reason the book is of especial value as a reference book to practitioners having cases in this branch of the law and to bar association and consular libraries. It is also of considerable public interest due to its discussion of a number of recent cases in Europe in this field which have appeared in the press.

The text discusses international responsibility for decisions of courts and acts of executive officers, the various theories of state denial of justice, unlawful arrest of aliens and their harsh treatment during imprisonment, refusal of access by aliens to the courts, unreasonable delay in administering justice, inadequate measures to punish persons guilty of crimes against aliens, inadequate judicial protection of aliens, the Calvo clause and other attempts to restrain diplomatic interposition, the international standards of substantive and procedural justice, and the measure of reparation for state denial of justice. The appendix consists of a League of Nations subcommittee report on cases in which a state is responsible for damage in its territory to foreigners or their property, and answers of twenty-five nations to a committee's questionnaire regarding state responsibility for refusing foreigners access to the courts, for court decisions in conflict with treaty obligations, for unconscionable delay of courts, and for court decisions prompted by ill will against foreign litigants, and excerpts from the discussion of these answers by the representatives of the various nations. It also contains extracts from Pan-American conferences on state responsibility and from draft codes on the subject by the Institute of International Law in 1927 and by the Harvard Research Committee in International Law in 1929.

The author of the book is a Detroit lawyer, but the research and documentation were evidently done at Geneva, Switzerland, in connection with the Graduate Institute of International Studies.

The book is the most comprehensive survey in the English language on the subject of state responsibility for denial of justice, and, although at times somewhat controversial in tone, is a valuable summarization of the precedents, practices and authorities in this particular field of the law.

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# THE WATERMAN FUND, IN COLORADO, FOR THE BENEFIT OF INCAPACITATED LAWYERS

By Smith Arthur Henry
*President of the Denver Bar Association*

THE lot of the aged, infirm or otherwise incapacitated lawyer is far from an easy one. He is, to some extent, the truly "forgotten man." Every bar association has attempted, through some form of "old age fund" or other rather unofficial action by individual members, to meet this situation and to aid deserving cases where possible. In a majority of instances, however, financial conditions have prevented the extension of any systematic or effective assistance to such worthy members of the Bar who, by reason of age, illness or other incapacity, may be reduced to desperate circumstances of want.

The Denver Bar Association and the Colorado Bar Association have for a long time recognized the inadequacy of any possible provision made by the Association in attempting to alleviate such situations. Sincere efforts, of course, have been made to extend financial assistance to unfortunate but deserving members of the Bar, when such cases were called specifically to the attention of the Bar Association. In some instances assistance has been secured through the voluntary contributions of individual members of the Bar who were requested to assist in the particular case, generally such solicitation being made to members who were either personally acquainted with the person in need of such assistance or were at least familiar with the case. Response has been in most instances very generous but it is obvious that such a type of assistance cannot be extended on any sustained basis, so that, while in many cases an individual could be tided over a short period of misfortune, in a serious case, where age or ill health prevented financial recovery of the individual, no real and lasting assistance could be extended.

As in every association, there has always existed, more or less by common understanding among the members of the Association, the practice of indirectly assisting a brother lawyer who was in the clutches of adversity, by the reference of business and, in some instances, the appointments made by the courts to various types of cases, which would extend some assistance to such persons. No real fund was available for any systematic and effective assistance in such cases of need but, by virtue of a very generous bequest made in the will of the late Mrs. Anna Rankin Waterman, the Denver Bar Association is assured of a most substantial fund accruing from the income incident to a trust fund of approximately $400,000.00.

By the terms of her will, Mrs. Waterman bequeathed an estate of some $400,000.00, in trust, with instructions that, after the death of three named life annuitants, the entire net income therefrom should be paid to the Denver Bar Association and by it used and expended in extending assistance to aged, infirm or otherwise incapacitated members of the Colorado Bar, in good repute and standing, who should have practiced for at least ten years in the State of Colorado.

It may be of interest to quote the language of the will itself, as evidencing the wide purpose contemplated by Mrs. Waterman and the lack of hampering detail imposed by the testatrix upon accomplishment of her objective:

> . . . I direct my said Executor and Trustee to pay over annually, or at more frequent intervals at its election, to the Denver Bar Association of Denver, Colorado, in perpetuity, the income, if any, accruing to my said Executor and Trustee from said residue of my estate, with my direction and earnest request that said Denver Bar Association, through its proper officers, shall use such funds when received, at its discretion, for the sole and only purpose of relieving the financial necessities, assuaging the hardships and lightening the financial burdens of aged, infirm or otherwise incapacitated members of the Colorado Bar, in good repute and standing, and who shall have practiced law in Colorado for a period of at least ten years prior to being a recipient of any of the benefits of this provision of this my last will and testament to them. Membership in said Denver Bar Association or the Colorado Bar Association or any other association or organization of lawyers is not requisite to the enjoyment of the provisions hereof. The fund to be utilized as herein provided may be known as the Waterman Fund, and I bespeak from said Denver Bar Association only the exercise of a wise and humane discretion in its use."

It will be noted that the purposes are broadly and generously stated but that the testatrix wisely relies upon the Bar Association for the effective administration and accomplishment of the purposes of her gift.

In the matter of any such gift, one is naturally interested in the background leading to its execution.

Senator Charles W. Waterman was himself a distinguished and able lawyer, a member of the American Bar Association, the Colorado Bar Association and the Denver Bar Association. Born of sound New England stock, in Waitesfield, Vermont, November 2, 1861. He attended the University of Vermont, graduating in 1885 with the degree of A.B., and from the University of Michigan in 1889 with the degree of L.L.B. In 1922 the University of Vermont also honored him with the degree of L.L.D. Senator Waterman had been forced to interrupt his college course and for a short while taught school in Northern New York and elsewhere, in order to secure additional funds for the completion of his education. Upon his graduation from the Michigan Law School in 1889, he came to Denver, Colorado and was admitted to the Colorado Bar in the same year. He liked the country and felt that there was a real future for an ambitious attorney.

While attending the University of Vermont he formed a deep friendship with Anna Rankin Cook. The friendship ripened into warmer affection and, after determining that he wished to settle in Denver, Senator Waterman returned to Vermont and

was married to Anna Rankin Cook, at Burlington, Vermont, on June 18, 1890. Immediately thereafter they returned to Denver and there established their home.

The Senator was a brilliant lawyer and a keen and indefatigable worker. He soon became a member of the noted Denver law firm of Wolcott, Vaile and Waterman. He was especially successful in the field of corporate law and represented ably many of the leading railroad and industrial corporations of the Rocky Mountain area. He contributed greatly to the development of the then young beet sugar industry in Colorado, which is now recognized as one of the state's major industries.

In due course he was elected as United States Senator from Colorado, for the period 1927 to 1933, but his health had begun to fail and his death occurred during his term, on August 27, 1932, at Washington, D. C.

Throughout all this period of Senator Waterman's success, Mrs. Waterman was well content to devote her life to her home. She, of course, made her husband's interests her own and was an ever present source of helpful aid and inspiration to him, but found her chief pleasure in her home and her circle of acquaintances rather than in political or social activity.

Senator Waterman had always cherished a deep and sincere regard for his alma mater, the University of Vermont, feeling that it had given him an educational impetus which had carried him forward so successfully through life. In his will, after due provision for his widow, he established a most substantial endowment for the University of Vermont, but at this time the idea of establishing a fund for the assistance of needy lawyers had not evolved.

The Senator had always been interested and active in bar association matters. He was a member of the American, Colorado and Denver Bar Associations, and had been interested in the work of all three. Elroy N. Clark, also an able and distinguished member of the Denver Bar, had been a college classmate of Senator Waterman, and in later years his most intimate friend and counsellor in many matters. He had also been a life long friend of Mrs. Waterman. After Senator Waterman's death, Mr. Clark likewise continued as Mrs. Waterman's attorney and adviser. At about this time one of the sporadic requests for the extension of assistance to some aged member of the Denver Bar came to Mr. Clark. He investigated the situation and became impressed with the fact that such needy cases not only existed but that such cases inevitably would continue to arise. It occurred to him that here was a worthy field for charity indeed, and he made a rather thorough investigation to see whether or not recognition had been given in this field in other states. It appeared that the matter had received almost no attention.

Mrs. Waterman had long been appreciative of the many friendships her husband had enjoyed among the members of the Colorado Bar, and had shared his deep respect and affection for the legal profession. She was desirous in her will of affording recognition of the friendships made and success attained in Colorado by her husband, and naturally the question was discussed with Mr. Clark. He called attention to the real and lasting service that could be performed in the establishment of a trust for the aid of incapacitated and aged lawyers who were in real need and the fact that, if real assistance were to be extended in such a field, it must be accomplished in such a way that the work could be effected without humiliation to the recipient.

MRS. ANNA RANKIN WATERMAN

As a result of discussions of this matter, when Mrs. Waterman's will was offered for probate, it contained the provisions above quoted. In addition to the excerpts quoted, the will, as a matter of protection, made provision for the possibility of any legal impediment that might exist with respect to the ability of the Denver Bar Association to accept the gift, providing that, if such incapacity existed at the time of probate of the will, it should be proper for the Association to qualify itself; or, if that should not be possible, then provision was made for the payment of the funds involved to such association or organization in the State of Colorado as the executor and trustee should regard as being capable of effectuating the purposes of the charitable trust established. The Denver Bar Association, however, being a corporate entity with appropriate powers, no legal obstacle to the vesting of the gift existed. The property and funds of the Association are administered through its board of trustees and, although no specific working organization has as yet been developed in connection with administration of the Waterman Fund, in all probability its distribution will be effected directly by and through the trustees.

(*Continued on page* 961)

# ADMINISTRATIVE CONTEMPT POWERS: A PROBLEM IN TECHNIQUE

Should the Practice Authorized in Interstate Commission vs. Brimson Be Altered?—State Practice as to Contempt Powers Conferred on Certain Administrative Agencies—Such Powers No Longer Exclusively Judicial—Advisability of Conferring Them upon Interstate Commerce Commission, etc.*

By E. F. Albertsworth

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IN the well-known Brimson Case,[1] decided 7 years after the original Act to Regulate Commerce (Approved Feb. 4, 1887) was enacted, the question at issue before the Court was the validity of the 12th section authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documents, books, and papers, in that it imposed upon the federal judiciary duties not judicial in their nature. By a 5 to 3 judgment (Mr. Justice Field taking no part), the majority of the Court held that a "case" or "controversy" was found to be present within the meaning of the Constitution, so that non-compliance with the resulting judgment of the Court placed the contumacious respondent in contempt, not of the Commission, but of the Court. The Act itself was express upon the point that the Commission had no power to punish a recalcitrant respondent or witness for so-called contempt of court. The legislative mind in the United States had not up to that time enlarged its horizon to envisage such a possibility of an extension of judicial power, nor its conferrence upon an administrative body, likely regarded in that era as an "alien" disturbance in the triune mold of governmental administration.

Apparently influencing the majority of the Court to sustain what was then a novel question, but now a well-established practice of judicial enforcement of administrative orders, was the "inarticulate premise" that without the aid of judicial process of some kind the regulations of the Commission in respect to interstate commerce could not be adequately or efficiently enforced. Behind every well-reasoned judgment of the Court, even in that era, lurked the embryonic ideas of juristic realism, or the will to accomplish rational objectives in the juridization of human relationships. The sanctions of the criminal law provided by Congress in furtherance of administrative process were thought to be too slow and cumbersome for efficient government—and are still too slow. This premise of the majority of the Court in the Brimson Case is set forth by a dictum of Mr. Justice Harlan, as follows:[2]

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . The power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."[3]

It will be noted that the learned justice relied upon "due process" as invalidating any suggested attempt of Congress—there was no such attempt before the Court in the Brimson Case—for conferring power upon the Commission to punish for contempt by way of fine or imprisonment. The influence of this dictum of 45 years ago has been far-reaching and solidly embedded in federal administration of justice, for uniformly, subsequent legislation of Congress with respect to other administrative agencies, even in so-called "bloodless revolution" days—the National Labor Relations Board being one of these—has followed the model of the Act of 1887 sustained in the Brimson Case, with no attempts made to confer upon administrative agencies in the federal set-up power to punish for contempt directly. Always the judicial arm has been invoked to supply the necessary sanction for summary enforcement of administrative appeals for judicial aid, with apparently no crystallized recognition of the essential unity of all administration of justice, but with rather deep-rooted belief in the separateness of function of administrative justice from judicial justice, inculcated by ancestral conceptions of constitutional doctrines of triune government.

When, therefore, I raise the inquiry whether the practice of the Brimson Case should now be altered, I refer obviously only to the more restricted phase of that practice, namely, whether the power of Congress despite the Harlan "brooding omnipresence," and in view especially of subsequent developments in constitutional doctrine and outlook, would now admit, with judicial blessing, power in the Interstate Commerce Commission (progenitor of all federal commissions) to punish for contempt directly, in certain restricted in-

*An address delivered before the annual convention in San Francisco, California, Sept. 7-8, 1939, of the Association of Practitioners Before The Interstate Commerce Commission.

1. (1894) 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

2. Supra, note 1, at p. 453.

3. Justice Harlan relied strongly upon a decision from Massachusetts—Whitcomb's Case, (1876) 120 Mass. 118, which considered, obviously, only State "due process" of law.

stances, without the aid of the judicial branch of government. As all legislation, barring revolutionary attempts, moves haltingly forward and backward, pricking out lines of approach to human problems requiring juridization, and as inherited legal concepts and institutions "wither away" under pressure of social and economic forces, consideration of the question propounded may not be inapropos or inopportune. And besides the question whether it could be done is an ancillary one—whether it should be; the one is a question of power, the other of policy; the one rests in the judicial conscience; the other in the so-called inscrutable wisdom of Congress.

### State Practice With Respect to Contempt Powers Conferred Upon Certain Administrative Agencies

In discussing the question, reference to the practice of some State governments in this field is important, for until recent years these have been the laboratories of juridical experiment in the United States under the basic constitutional philosophy and sanction of the Tenth Amendment, namely, that they are governments not of limitation, but only of prohibition,—unlike the Federal Government. It will be noted that I place a time limit—"until recent years"—upon this observation, for the sweep toward a conception of nationalism versus federalism in government makes for pause in the theory and practice of constitutionalism in the United States at this time. But more of this later. Suffice to say, since 1894—the date of the Brimson Case—there have been many changes in governmental machinery in the various States concerning administrative developments in particular and other governmental devices and techniques. These developments should throw light upon the question now under inquiry.

Not long after the Brimson Case, the Supreme Court, in 1902, in Dreyer v. People of the State of Illinois,[4] had before it for adjudication the question whether any federal constitutional right was infringed where one of the several States commingled the powers of government in one agency without regard for the separation of powers; or stated otherwise, in a different and perhaps more secular vernacular and one well-understood, if one of the several States desired "scrambled eggs" in government instead of enjoying them otherwise, was there any objection under the Constitution of the United States? In holding that the States might suit themselves in this regard in so far as the federal Constitution was concerned, Mr. Justice Harlan, again speaking for the Court, said:

> "Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department, may in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."[5]

In passing, it may be mentioned, but briefly, how difficult it has been to obtain from the Supreme Court, at least in the past, a judicial pronouncement that a given State governmental machinery has violated the so-called "republican form of government" apparently guaranteed by the Constitution.[6] The judicial formula of "political question" has served as justification for judicial neutrality in State experiments in new forms of governmental set-up. The effect has been to have in some instances one form of governmental device and practice in the several States, and another in the federal scheme of things.

The decision in the Dreyer Case made the first erosive inroad upon the Harlan dictum, that due process of law would be violated if powers to punish for contempt were conferred upon administrative agencies in the federal governmental orbit. For, if one of the several States could with impunity so far as constitutional inhibitions were concerned, commingle the powers of government, it must follow that powers to punish for contempt, in the theoretical sense at least, would be included, leaving for judicial construction the pricking out of lines of demarcation as circumstances required. Thus we would have one meaning of "due process" of law in the Fifth Amendment controlling the Federal Government and an entirely different one in the Fourteenth, controlling State action. That such a conclusion is illogical seems patent; and the later decisions of the Court make it clear that in other respects —barring perhaps questions of extent of jurisdiction of the Federal power[7]—their meaning is identical in every respect. In Hibben v. Smith,[8] Mr. Justice Peckham said:

> "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State action affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress."

The State of California has taken the lead in two important respects in this field of conferring contempt powers upon certain administrative agencies. The first instance is in connection with the State Railroad Commission. The Constitution[9] of that State provides:

> "The [railroad] Commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints . . . ; to issue subpoenas and all necessary process and send for persons and papers; and the Commission and each of the commissioners shall have the power to administer oaths, take testimony, and punish for contempt in the same manner and to the same extent as courts of record . . . "[10]

The second instance in California is that relating to the State Workmen's Compensation Commission. Under the State Constitution it has broad powers similar to those of the Railroad Commission already outlined, including the power to punish for contempt "in like manner and to the same extent as courts of record."[11] In Western Metal Supply Co. v. Pillsbury,[12] the Court stated that in exercising these powers the Commission was performing precisely the same functions that are performed by any court in passing upon questions brought before it, and that no judicial

4. (1902) 187 U. S. 71, 47 L. Ed. 79, 23 S. Ct. 28.

5. And see further Forsyth v. City of Hammond, 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665.

6. Cf. Pacific States Tel. and Teleg. Co. v. Oregon (1912) 223 U. S. 118.

7. Cf. United States v. Bennett (1914) 232 U. S. 299, 58 L. Ed. 612, 34 S. Ct. 433.

8. (1903) 191 U. S. 310.

9. Article XII, sec. 22.

10. See also the California Pub. Utilities Act, secs. 54, 81, and the decision of Van Hoosear v. Railroad Commission (1922) 189 Cal. 228, 207 Pac. 903.

11. Apparently this terminology takes its origin from the fact that at Common Law only courts of record had power to punish for contempt. See infra note 30.

12. (1916) 172 Cal. 407, 156 Pac. 491.

action on the part of the superior court or any judge thereof was required to give to the Commission's award the full force and effect of a judgment.[13] So far as known, these two provisions with respect to power to punish for contempt conferred upon these two important State administrative bodies, have never been overthrown by any decision of the United States Supreme Court; and there appears to be no arbitrary government of men and not of laws in the State within these orbits of power. For in the background, or in the shadows as it were, still remains the sanction of judicial review of excessive administrative action in the event the machinery set up invades fundamental rights.

Other States—particularly Louisiana and Oklahoma—have enacted similar legislation with respect to public service or railroad commissions.[14] And in Missouri the State Supreme Court has held that a county board of equalization of tax assessments has power to punish a contumacious witness, not as a court, but as an arm of "the legislative department of the State government."[15] Authorization of such powers to notaries may conceivably be sustained on the ground that such officers are an arm of the judiciary.[16] In the State of Georgia the Supreme Court sustained contempt powers conferred by the Legislature upon a board of police commissioners,[17] while in North Carolina a similar authority was conferred and sustained to the State Industrial Accident Commission.[18] While it is recognized that the greater number of the several States adhere to the federal practice of non-delegation of powers to punish for contempt, particularly as set forth in the old Indiana decision of Langenberg v. Decker,[19] decided before the Brimson Case, sufficient contra practice has been indicated to show that "due process" of law is nonetheless satisfied with such a practice, and that no Supreme Court upset is possible on the basis of a resulting federal question. Such discussion, it is hoped, is pertinent to the inquiry whether the Brimson Case practice could, under constitutional sanction, be altered at the present time. In the light of this State procedure, and in view of the fact that "due process" is identical in meaning in both the Fifth and Fourteenth Amendments, an affirmative answer can be given. If a negative answer be given, then the entire State practice predicated upon Dreyer v. Illinois would have to be overthrown, which would have such far-reaching consequences in the governmental structure, and would so upset the relations of Supreme Court and State experiments, as to be unthinkable. Moreover, in view of the fact that unlike the Federal Constitution, these State constitutions contain express prohibitory provisions against the exercise of commingled powers of government, it is readily perceived that a stronger case for a similar federal practice of conferring powers to punish for contempt upon administrative agencies can be made out should the question again be legislatively presented to the Supreme Court. Analytically and realistically, inasmuch as administrative boards often perform purely judicial functions—or "quasi-judicial" functions in the terminology of the older judges of another generation—particularly when they render decisions of specific or concrete application, there is nothing inherently harmful in their being empowered, in certain limited circumstances, to make use of the heretofore exclusively regarded judicial power, namely, to punish for contempt. Especially would this be true of an administrative organ of such quality as the Interstate Commerce Commission, "appointed by law and informed by experience." It is submitted, then, that the Harlan dictum in the Brimson Case sprang from an era in constitutional thinking where the absolute and inflexible were dominant categories, whereas 45 years of experience in the affairs of modern complex government since then have indicated some rather serious doubts on that score. And in concluding this line of thought, it may not be inapropos to remind my legal brethren that since 1937 it has not been the fashion to declare acts of Congress unconstitutional, as seen not only in decisions of our highest federal Court, but also in statutes of the Congress making it difficult for private litigants alone, without federal governmental intervention, to present the issues of constitutionality of federal laws and regulations.[20] Thus if a federal statute or amendment were now enacted conferring upon our noble Interstate Commerce Commission, under certain limited circumstances, authority to punish for contempt, the ponderables would likely outweigh the imponderables.

### Contempt Powers no Longer Exclusively Judicial

Since the Brimson decision of 45 years ago, other trends have appeared in our constitutional thinking, as brought to light in decisions of the Supreme Court prior to 1937, which have further made us less dogmatic that contempt powers could not be conferred upon other than judicial bodies. At the time Justice Harlan wrote, in 1894, there had not been elaborated by the Court the later conception of the power of contempt as ancillary to a legislative function of either or both Houses of Congress. Harlan himself in the Brimson opinion appeared to restrict this auxiliary power to the right of "either House" to punish "disorderly behavior upon the part of its members, to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies."[21] But much water has flowed under the judicial mill since 1894 in formulation of the conception that in order to obtain information for proposed legislation, both Houses of Congress have wide powers, ancillary and auxiliary, to punish recusant parties for contempt, by summary methods, without invoking the slower processes of the criminal law. In McGrain v. Daugherty,[22] in Barry v. United States ex rel Cunningham,[23] and in Jurney v. McCracken,[24] this conception of ancillary power to punish for contempt in connection with legislative functions is elaborated, refined, and applied to concrete instances.[25] This recognition by the Court of the existence of summary methods such as contempt powers in other than judicial bodies, though predicated upon historical analogies, is a break-away from the heretofore rigid conceptions of non-commingling of divided powers of government, and is therefore symptomatic of the "withering away" of the older and inherited outlook in these relationships.

The entire problem becomes further enmeshed

13. This practice is still adhered to. Cf. Standard Oil Co. v. State Bd. of Equalization. 6 Calif. (2d) 557 at p. 570.
14. La. Const. Art. VI, sec. 4 (1912); (Pub. Service Commission); Oklahoma (1931) Const. Art. IX, sec. 19 (Compensation Comm.).
15. In re Sanford (1911) 236 Mo. 665, 139 S.W. 376.
16. (1927) Noell v. Bender, 317 Mo. 392, 295 S.W. 532.
17. Plunkett v. Hamilton (1911) 136 Ga. 72, 70 S.E. 781.
18. In re Hayes (1931) 200 N. C. 133, 156 S.E. 791.
19. (1892) 131 Ind. 471, 31 N.E. 190.
20. Pub, No. 352, 75th Cong. Ch. 754, 1st sess.
21. Justice Harlan quoted two older cases—Anderson v. Dunn, 6 Wheat. 204 and Kilbourn v. Thompson, 103 U. S. 168.
22. (1927) 273 U. S. 135.
23. (1929) 279 U. S. 597.
24. (1935) 294 U. S. 125.
25. On the whole matter, cf. Landis, "Constitutional Limits on Congressional Power of Investigation," 40 Harv. L. Rev. 153, and Potts, "Power of Legislative Bodies to Punish for Contempt," 74 Univ. of P. L. Rev. 691, 780.

with the nature of the relationship that certain important federal administrative agencies sustain with reference to the legislative branch, the Congress. If these agencies themselves are executing legislative policies rather than executive, and are but cogs in the great wheel of legislation in the Ezekielian sense, why may they not equally with their creator have similar summary powers of enforcement, in order to obtain information as well as to enforce their orders, and especially the former—the incipient stage of administration? Have we here also in our constitutional thinking the formulation of another concept or label with which our Court will eventually sustain, under safeguards, conferring of contempt powers upon federal administrative agencies? Have we here the recognition in our juridical outlook of Maitland's philosophy that "law is a seamless web," with lip service still given to the triune conception of government, but actual practice permitting its violation due to the "necessities of government"? In any event, in Rathbun v. United States,[26] in 1935, the Court in order to prevent arbitrary Presidential removal of a member of the Federal Trade Commission was forced into the formula that this Commission was to be catalogued not as an arm of the Executive branch of government, but rather of the Legislative, carrying into effect legislative policies; being performed without Executive leave, it had to be free from executive control. Similar reasoning may be applied to the work of the Interstate Commerce Commission, pioneer of all administrative offspring. If, then, these important federal agencies are engaged in the performance of legislative policies, as well as the execution often-times of legislative functions, can it not be said that as ancillary to these powers and duties, the Congress might validly confer upon them the summary power to punish for contempt, without invoking as is now the practice, the aid of the federal judiciary? The inevitable "rise and fall"[27] of Constitutional doctrine, as already enunciated in this restricted field, but to be found also elsewhere in constitutional doctrine and thinking,[28] would seem to furnish an affirmative answer to the question whether constitutionally the authority can be conferred? The remaining question is, Should the practice followed since the Brimson Case now be altered? This is obviously a question of Congressional policy.

### Advisability of Conferring Contempt Powers Upon The Interstate Commerce Commission

Bound up with this question of advisability or policy, is a broader one, namely, Should the powers of administrative agencies in so far as they are judicial be divorced and conferred upon the courts? Stated otherwise, should administrative boards and commissions continue to be prosecutors, triers of fact, and judges at the same time? If not, if there is a strong current to deprive them of judicial powers already exercised, then at the same time now to urge that they be given additional so-called judicial powers to punish for contempt does not come at an opportune time or with good grace. It is matter of common knowledge in the legal profession that in 1936 a Committee of the American Bar recommended a divorce of judicial power from the fact-finding functions of administrative agencies in general. Later a separate Administrative Court System in the Federal scheme was likewise advanced by a similar Committee, modeled somewhat after the Droit administratif of the French practice. Thus far, however, no changes have occurred in the realm of practice embodying these proposals. Like the work of Lord Chief Justice Hewart in his "The New Despotism,"[29] likely we are now only in the stage of discussion, with action, if any, yet to come. Until such eventuation, it is idle to speculate and one must deal with realities as they exist. Nonetheless, granting the advisability of separation of judicial from fact-finding functions, the method of contempt to obtain evidence, compel appearance of witnesses, etc., could still be validly conferred and practiced as separate and antecedent to the actual work of decision on the law or jurisdiction, the latter functions of which are still today usually subject to judicial review. I find, therefore, no difficulty with the proposals advanced by the American Bar Committee or their accomplishment as reforms.

It must not be forgotten that the Common Law courts not of record had no power to punish for contempt.[30] Hence, it is incorrect to generalize by saying that the power to punish for contempt was essentially a judicial power inherent in all courts. And we have already seen that Parliament, the Houses of Congress, and the several State Legislative bodies likewise have been held to possess this power. Therefore, it would seem to follow that conferring it also, in limited fashion upon administrative tribunals of paramount importance in the Federal scheme, in their investigatory and incipient functions, where judicial functions are actually being performed, would not necessarily result in the delegation of a purely judicial power. And performing at the same time also legislative functions in carrying out policies of legislation, where information is vitally necessary to be acquired summarily without delay, would seem to argue further for the advisability of possession of such powers. Certainly, the stage in the constitutional sense is set for this attempt.

But to confer broadly such power upon all types of federal administrative agencies in various forms of legal existence from the "amoeba" upward, would appear in my judgment to be an unwise step; if at the Common Law only the more important courts—those of record—were permitted this power, obviously only the more important administrative tribunals should be so entrusted—if Congressional policy were so disposed. For enmeshed with this problem of policy now under consideration is the larger one, of great public importance, namely, whether potentialities of tyranny and arbitrary action by bureaucrats—"a government of men, not of laws"—would be increased rather than lessened through imposition of this added power to punish for contempt, if indiscriminately granted to all types of administrative agencies without safeguards. On this score it has been well said:[31]

"Bureaucracy is no more to be trusted to inquire generally into the private affairs of citizens today than in the times of Wilkes and Otis; even though bureaucracy is a part of the Republican government."

The petty abuses which might result from an incompetent personnel found in the lower officials of gov-

26. (1935) 295 U. S. 602.

27. Sharp, "Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions" (46 Harv. L. Rev. 361, 593, 793) 1933; and cf. my discussion, "The Mirage of Constitutionalism" (1935) 29 Ill. L. Rev. 608.

28. In "Streamlining the Constitution" (1939) 16 New York University Law Quarterly Rev. 1 endeavored to point out these tendencies.

29. Published 1929.

30. Oswald, "Contempt of Court," (3d ed. 1910), pp. 5, 11-12.

31. Dutt, "Fascism and Social Revolution" (1935) 2d ed., p. 245.

ernment[32] would clearly militate against blanket conference of such wide powers of contempt over the affairs of persons and corporations subject to the veritable host of our present-day administrative agencies. I am not prepared, therefore, to argue for blanket imposition of such power upon all forms of administrative bodies; in fact, I should the rather vigorously oppose it. On the contrary, I do, however, believe that such authority may safely be conferred upon the Interstate Commerce Commission, but restricted to the incipient steps of administration, namely, that of eliciting testimony. Any subsequent steps, such as enforcement of orders of the Commission other than those arising out of the investigatory function, should require the safeguards, if not the checks, of the judicial process in courts of justice. Here I confess myself to be a victim in the web of "pricking lines of approach" in legislative reforms, proceeding cautiously through trial and effort in the laboratory of governmental experiment. To this extent, then, the rule of practice as laid down in the Brimson Case—Harlan's dictum notwithstanding—would be changed. That it be constitutionally possible, I think has been established to the satisfaction of our present dynamic era; whether it should be, must depend upon matters of judgment and policy as reflected in the enlightened work of this Association and incorporated into statute. Simply a declaration by the Congress that the Commission should hereafter be a legislative court would transmute this juridical body from one lacking powers to punish for contempt into one possessing them. To take such a step, however, would present difficulties as to tenure of the commissioners, who would then be judges; and moreover, might run afoul of objections that similar powers might well be extended to other federal agencies—such as the National Labor Relations Board—where undoubtedly passionate hostility would be encountered by those subject to the Wagner Act, dealing with relationships where controversy and feeling are more pronounced than in the more rational realm of rate regulation and services of railways and motor carriers. I do not suggest this remedy as the ideal solution, but simply raise the inquiry as a method. More particular solutions must come from the give and take of legislative draftsmanship. That such a change will eventuate is, in my judgment, only a question of time, in the interests of better administrative efficiency consistent with constitutional safeguards to the individual.

## BAR EXECUTIVES FROM COLORADO, WYOMING AND NEW MEXICO MEET TO DISCUSS MUTUAL PROBLEMS

BY WILLIAM HEDGES ROBINSON, JR.
*Secretary Colorado Bar Association; Member of the Denver Bar*

BAR ASSOCIATION officials from Colorado, Wyoming and New Mexico gathered at The Broadmoor Hotel in Colorado Springs, Colorado, on September 24, 1939, for a round table discussion of bar association work and activities. The conference, which is the first of a series of proposed regional meetings this year was held under the auspices of the Section of Bar Organization Activities of the American Bar Association.

The theme of the conference was well stated by Burt J. Thompson of Forest City, Iowa, Vice-Chairman of the section who, in stating the purpose of the meeting, said:

"Let's begin to be realistic and think more about 'Professional Economics,' or 'a living for lawyers' and mean what we say.

"If we make some headway, perhaps it will not be necessary to devote so much time to discipline. And perhaps we will begin to interest an increasing number of the great majority who are conducting their own business on the theory that the practice of law is entirely a matter of the survival of the fittest and fastest.

"With this conception in mind, it is not the business of bar associations to take something to the individual lawyer that he can use; give him something he does not have that is of practical value? In other words, let's change the direction and *justify* the existence of our Bar Organizations by making out of it a power house that vitalizes a lawyer's chance of success; not only those at the top who need assistance the least, but the rank and file who are always having just a little trouble in keeping up with the procession.

"And in this effort we should not lose sight of our joint and several obligations to the society in which we live, nor to the beneficient government under which we survive. But our first concern is to weld our profession together and keep it alive and well to the end that its potential influence may be preserved and made available when the day comes that our institutions are assailed."

Charles A. Beardsley, President of the American Bar Association, participated in the conference both as a speaker and attentive listener. He explained in an informal manner some of the problems which the California State Bar had met and solved, and pointed out the inevitable interworkings of the local bar association to the state and the state to the national. He suggested that as the local association became more valuable to the local lawyers it thereby strengthened the state association which in turn strengthened the national organization. With the abolition of state committees from the American Bar Association, the work of development and growth was left where it should properly be, in his opinion, namely with the local associations.

Bar association executives attending the conference readily concurred in statements of objectives proposed by Messrs. Beardsley and Thompson. The conference, adhering largely to a proposed agenda for the sake of direction, immediately began to exchange ideas which had proved productive and beneficial to the practicing lawyers in various communities. This interchange of ideas gave every person attending the conference new slants on bar association work, and suggested new programs to be adopted in their work.

One of the most stimulating discussions centered around legal institutes. The happy experiences of the state associations in Iowa and Colorado in giving the practicing lawyer something of immediate and practical value through the legal institutes was related, and executives from other states investigated the methods of procedure at some length in order to establish similar institutes in their own states within the year.

Executives at the conference showed special interest in procedures adopted by other associations which aided in attracting greater numbers of the profession to an association and thereby produce a more cohesive and co-ordinated group. It was the consensus of the conference that membership drives were a failure for the reason that the approach was wrong

32. Handler, "Constitutionality of Investigations by the Fed. Trade Comm." (1928) 28 Col. L. Rev. 708; Langeluttig, "Constitutional Limitations on Administrative Power of Investigation," (1934) 28 Ill. L. Rev. 508.

and that valuable energy was dissipated. It was agreed that the only way to build a strong bar association was to make the association valuable to its membership and thereby create a desire to join.

Outside of the field of legal institutes, which experience has shown creates such an interest, the executives discussed the possibility of large scale advertising on behalf of the profession as a whole. Much interest was evidenced in the experience of the Iowa association in regard to such advertising.

Ideas were exchanged on the methods of tieing together the related work of the law schools, the bar examiners and the bar associations. Stanley M. Wallbank of Denver, Chairman of the National Conference of Bar Examiners, discussed at length some of the problems involved and suggested certain procedures which the conference had found satisfactory especially regarding the admission of the so-called "floating attorneys." Suggestions were also advanced as to the possibility of making law school students associate members of the bar associations.

Another interesting discussion led chiefly by W. E. Stanley of Wichita, council member of the Section on Bar Organization Activities, concerned the publication of bar journals. Many ideas were exchanged on the methods of making such publications more attractive and valuable to the members of the profession.

Paul F. Hannah, National Chairman of the Junior Bar Conference of the American Bar Association, the executives to establish and aid local Junior Bar urged the executives to establish and aid local Junior Bar units. He pointed out that much of the energy and enthusiasm for bar association work comes from the younger men and that if they are properly encouraged and directed they can become a vital factor in bar work.

It was the opinion of those who attended that such meetings were the beginning of a new era in bar work because for the first time an effort was being made to organize lawyers not on the basis of a top heavy governmental set up but on a program which appealed to and affected the average practicing attorney. This conference created for the first time a medium through which bar executives could discuss frankly their problems without exposing them to laymen who might be unsympathetic to present achievements, and also provided a means for associations to benefit by the trials, errors, and results of other associations. The lack of formality of the conference aided this objective. While there was an agenda for the meeting, there was no set speech and no pretensions. It was simply an earnest round table discussion of the means to benefit the practicing lawyer by bar associations activities.

## ROSTER OF LAW LISTS APPROVED, AS TO 1940 EDITIONS, BY THE SPECIAL COMMITTEE ON LAW LISTS OF THE AMERICAN BAR ASSOCIATION

SINCE the publication of the roster of law lists approved as to 1939 editions, in the January, 1939, number of the JOURNAL, the Special Committee on Law Lists has made further intensive investigations which are reflected in the roster submitted herewith for the guidance of our membership at this time.

Each applicant, i. e., issuer of a law list, was required to file an application for the approval of his 1940 edition even though an approval had previously been granted as to his 1939 edition. This course of procedure proved to be sound, inasmuch as the requirements were necessarily somewhat more exacting than a year ago. Now also, with substantially a year's experience as a background and with the initial stages pretty well encompassed, the Committee has been better able to proceed, not only to cover once more the ground which entails accepted fundamentals, but to enlarge in various ways upon the entire program, in systematic, effective and practicable sequence. It must be borne in mind that this is the first serious attempt since the origin of law lists on the part of the Bar to control and very largely direct the policies of this increasingly important industry on a national scale. Hence, if certain problems may not yet appear to have been solved that will be due in most instances, not to the fact that this Committee has either failed to discover them or to recognize their existence, but rather because it has found it more expedient to deal first with the problems which seemed most urgent. By thus proceeding, we hope to develop an orderly progressive program which will in the end comprehend and effectively promote all phases of the Law List problem which are dealt with in the report adopted at Kansas City.

The Bar has responded to our invitations to assist in this movement in a most satisfactory way. This has been decidedly reassuring in that it has demonstrated that lawyers are indeed interested. Continued cooperation is earnestly solicited. Among our immediate objectives is the elimination of lawyers' names from unapproved lists. Canon 43 makes it unethical for a lawyer to permit his name to be published in a list which has not been approved and with the cooperation of the Standing Committee on Professional Ethics and Grievances a great deal has already been done to enforce this canon which, in a sense, constitutes the keystone to the entire law list program.

Herewith are the names and addresses, in alphabetical order, of the lists whose 1940 editions have, thus far, been approved. Action was deferred with respect to certain other lists at the meeting of the Committee held in Chicago on September 29th and 30th and October 1st, and should occasion require, a supplemented roster will be published later.

AMERICAN BANK ATTORNEYS, 18 Brattle Street, Cambridge, Mass.

THE AMERICAN BAR, Fawkes Building, Minneapolis, Minn.

AMERICAN INSURANCE LAWYERS ASSOCIATION, 2910 A. I. U. Citadel, Columbus, Ohio.

AMERICAN LAWYERS ANNUAL, N. B. C. Building, Cleveland, Ohio.

AMERICAN LAWYERS QUARTERLY, N. B. C. Building, Cleveland, Ohio.

A. C. A. LIST, 92 Liberty Street, New York City.

ATTORNEYS LIST (U. S. F. & G.), Redwood and Calvert Streets, Baltimore, Md.

THE B. A. LAW LIST, Plankinton Building, Milwaukee, Wis.

BANKERS LAW REGISTER, 20 Vesey Street, New York City.

THE BAR REGISTER, 21 West Street, New York City.

BEST'S RECOMMMENDED INSURANCE ATTORNEYS, 75 Fulton Street, New York City.

CAMPBELL'S LIST, 140 Nassau Street, New York City.

CLEARING HOUSE QUARTERLY, Fawkes Building, Minneapolis, Minn.

THE COLUMBIA LIST, 320 Broadway, New York City.

THE COMMERCIAL BAR, 521 Fifth Avenue, New York City.

CORPORATION LAWYERS DIRECTORY, 141 W. Jackson Blvd., Chicago, Illinois.

THE C-R-C ATTORNEY DIRECTORY, 50 Church Street, New York City.

FORWARDERS LIST OF ATTORNEYS, 38 S. Dearborn Street, Chicago, Illinois.

THE HAYTHE GUIDE, 261 Broadway, New York City.

HINE'S INSURANCE COUNSEL, 38 S. Dearborn Street, Chicago, Illinois.

THE INSURANCE BAR, 343 S. Dearborn Street, Chicago, Illinois.

INTERNATIONAL LAWYERS LAW LIST, R. K. O. Building, New York City.

THE LAWYERS DIRECTORY, 18 E. 4th Street, Cincinnati, Ohio.

THE LAWYERS' LIST, 70 Fifth Avenue, New York City.

MARTINDALE-HUBBELL LAW DIRECTORY, 21 West Street, New York City.

THE MERCANTILE ADJUSTER, 10 S. LaSalle Street, Chicago, Illinois.

THE NATIONAL LIST, Empire State Building, New York City.

RAND MCNALLY LIST OF BANK RECOMMENDED ATTORNEYS, 538 S. Clark Street, Chicago, Illinois.

RUSSELL LAW LIST, 527 Fifth Avenue, New York City.

SULLIVAN'S LAW DIRECTORY, 33 S. Market Street, Chicago, Illinois.

THE UNITED LAW LIST, 280 Broadway, New York City.

WILBER DIRECTORY OF ATTORNEYS AND BANKS, 299 Broadway, New York City.

WRIGHT-HOLMES LAW LIST, 225 West 34th St., New York City.

ZONE LAW LIST, Louderman Building, St. Louis, Mo.

## FOREIGN LISTS

(U. S. A. SECTIONS)

CANADA BONDED ATTORNEY, 57 Bloor Street, Toronto, Canada.

CANADA LEGAL DIRECTORY, 57 Bloor Street, Toronto, Canada.

CANADIAN LAW LIST, 24 Adelaide Street E., Toronto, Canada.

J. W. CRONIN
Chairman, Section of Insurance Law

WILLIAM ROY VALLANCE
Chairman, Section of International and Comparative Law

EMPIRE LAW LIST, 4 Bell Yard, Temple Bar, London, W. C. 2, England.

INTERNATIONAL LAW LIST, 104 High Holborn, London, W. C. 1, England.

KIME'S INTERNATIONAL LAW DIRECTORY, 75 Fairfax Road, N. W. 6, London, England.

THE LAW LIST, 119 Chancery Lane, London, England.

THE SCOTTISH LAW DIRECTORY, 12 Bank Street, Edinburgh, Scotland.

THE SCOTTISH LAW LIST, 27 Thistle St., Edinburgh, Scotland.

The members of the Committee are Stanley B. Houck, Chairman, Henry S. Ballard, George E. Brand, Earle W. Evans and Cassius E. Gates. Anyone desiring to communicate with the Committee with regard to matters affecting law lists, will kindly address the Secretary, Mr. Martin J. Teigan, 209 South LaSalle Street, Chicago, Illinois.

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## STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933

Of American Bar Association Journal, published monthly at Chicago, Illinois, for October 1, 1939.

State of Illinois } ss.
County of Cook }

Before me, a Notary Public, in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to-wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, 1140 N. Dearborn St., Chicago, Ill. Editor-in-Chief, Edgar B. Tolman, 30 N. LaSalle St., Chicago, Ill. Managing Editor, Joseph R. Taylor, 1140 N. Dearborn St., Chicago, Ill. Business Manager, Joseph R. Taylor, 1140 N. Dearborn St., Chicago, Ill.

2. That the owner is: American Bar Association, Charles A. Beardsley, Pres., Central Bank Bldg., Oakland, Cal.; Harry S. Knight, Secretary, Sunbury Trust & Safe Dep. Bldg., Sunbury, Pa.; John H. Voorhees, Treasurer, Bailey-Glidden Bldg., Sioux Falls, S. D.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Joseph R. Taylor, Business Manager.

Sworn to and subscribed before me this 22nd day of September, 1939.

(SEAL) Helen P. Lovelace,

(My commission expires November 1, 1939.)

SYLVESTER C. SMITH, JR.
Chairman, Committee on Public Relations

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## THE WATERMAN FUND, IN COLORADO

(*Continued from page* 953)

Already numerous applications have come to the Association from lawyers in need, some directly from the individuals themselves, others through fellow lawyers who know of the particular individual's necessitous condition. It will undoubtedly be necessary to establish some systematic method of investigation of cases which may be entitled to participate in the benefits of this fund. The number of cases that may exist at any given time will, of course, determine to some extent on what scale assistance may be extended. On the basis of a somewhat general survey of the situation, however, it seems certain that the income from the Waterman Fund will be sufficient to enable a most substantial alleviation of the hardships that have heretofore existed in this particular field. It seems clear that utilization of the bar association in the administration of the gift is sound. There is an effective working organization already established and already in close contact with the lawyers. There should be no possibility of fraud or imposition with respect to participation in any of the benefits of such a fund, and certainly the trust is so important that the officers of the Bar Association would be most conscious of their obligation to exercise their best judgment and ability in the administration of the Fund.

No lawyer of wide experience can help but realize that here is a gift which will go far towards lightening a tragic load upon many proud and able men who, through no fault of their own, have fallen victims of adversity.

# DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

## FROM BULLETINS XLIV, XLV, XLVI, AND XLVII ISSUED BY THE DEPARTMENT OF JUSTICE

### RULE 2—One Form of Action

*Walter F. Downey v. Edith S. Palmer.* (Southern District of New York, LEIBELL, D. J., June 20, 1939).

In the absence of a Federal statute of limitations, the applicable state statute controls.

*Josephine McGrath v. Helena Rubinstein, Inc.* (Southern District of New York, JOHN W. CLANCY, D. J., July 17, 1939.)

In the absence of a Federal statute of limitations, the applicable state statute controls.

### RULE 4—Process—Subdivision (d)—Summons: Personal Service

*Leading Perfumers & Chemists, Inc. v. Nussbaum Novelty Company.* (Southern District of New York, MANDELBAUM, D. J., Sept. 18, 1939).

A foreign corporation is not subject to suit in a district in which it is not doing business within the meaning of the law of the state.

### Subdivision (f)—Territorial Limits of Effective Service

*Orma L. Gibbs v. The Emerson Electric Manufacturing Company et al.* (Western District of Missouri, Western Division, REEVES, D. J., Sept. 19, 1939).

The rule that process may run anywhere within the territorial limits of the state in which the district court is held is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established place of business.

### RULE 7—Pleadings Allowed; Form of Motions—Subdivision (c)—Demurrers, Pleas, Etc., Abolished

*Alta Mae Howard v. United States of America.* (Western District of Washington, Northern Division, YANKWICH, D. J., Sept. 1, 1939).

In an action brought after the effective date of the Federal Rules of Civil Procedure, the defendant filed a demurrer. *Held,* that the demurrer may be treated as a motion to dismiss. (Rule 12 (b))

### RULE 8—General Rules of Pleading—Subdivision (a)—Claims for Relief

*E. H. Martin et al. v. Ralph Moery et al.* (Eastern District of Illinois, WHAM, D. J., Sept. 23, 1939).

A general averment that the amount in controversy is more than $3,000 is an insufficient allegation of jurisdictional amount if the allegations of definite and concrete facts in the body of the complaint show that less than the jurisdictional amount is involved.

*Cal C. Chambers et al. v. Adolph Cameron et al.* (Northern District of Illinois, Eastern Division, WOODWARD, D. J., Oct. 3, 1939.)

An argumentative, verbose and prolix pleading, containing evidentiary matter, is objectionable and may be stricken.

### RULE 12—Defenses and Objections—Subdivision (b)—How Presented

*Max Sherover v. John Wanamaker, New York.* (Southern District of New York, LEIBELL, D. J., June 19, 1939).

A motion to dismiss the complaint on the ground it fails to state a claim must be limited to the pleadings and may not be supported by affidavits. Where affidavits are relied upon, the proper motion is for summary judgment. (Rule 56 (b))

*Alta Mae Howard v. United States of America.* (Western District of Washington, Northern Division, YANKWICH, D. J., Sept. 1, 1939).

In an action brought after the effective date of the Federal Rules of Civil Procedure, the defendant filed a demurrer. *Held,* that the demurrer may be treated as a motion to dismiss.

*Richard A. Engler v. General Electric Company.* (Southern District of New York, MANDELBAUM, D. J., Sept. 19, 1939).

In the absence of diversity of citizenship, a claim for fraud may not be joined with one for patent infringement if the former does not rest upon the same facts as the latter.

*Ralph G. Goodman et al. v. United States.* (Southern District of Iowa, Western Division, DEWEY, D. J., July 27, 1939.)

Failure to state a claim for relief may be raised as an affirmative defense in the answer as well as by a motion to dismiss.

### Subdivision (c)—Motion for Judgment on the Pleadings

*Florence Guggenheim v. Almon G. Rasquin.* (Eastern District of New York, GALSTON, D. J., July 5, 1939).

On motion for judgment on the pleadings, no consideration may be given to a stipulation of facts entered into solely for use at the trial.

### Subdivision (e)—Motion for More Definite Statement or for Bill of Particulars

*Emil E. Fischback v. The Solvey Process Company.* (Northern District of New York, BRYANT, D. J., Sept. 19, 1939).

A bill of particulars should be ordered only to the extent necessary to enable the moving party to prepare his responsive pleading.

*Harry S. Mann v. Cadillac Automobile Company*

*of Boston.* (District of Massachusetts, SWEENEY, D. J., Sept. 19, 1939).

Even if a party moving for a bill of particulars states that the information is sought for the purpose of enabling him properly to prepare a responsive pleading and to prepare for trial, the motion should be denied if the information sought is properly the subject of interrogatories and a responsive pleading can be prepared without such information. (Rule 33)

*Cullen F. Welty v. Warren W. Clute, Jr., et al.* (Northern District of New York, BRYANT, D. J., Sept. 19, 1939).

1. Bills of particulars and definite statements should be invoked only in respect to matters necessary to enable the moving party to prepare his responsive pleading.

2. A party taking depositions should not be required to limit his proof by a bill of particulars.

*Richard A. Engler v. General Electric Company.* (Southern District of New York, MANDELBAUM, D. J., Sept. 19, 1939).

Motion for a bill of particulars should be denied if a responsive pleading can be prepared without such information.

*Hubert F. Laugharn v. Louis Zimmelman, et al.* (Southern District of California, JAMES, D. J., June 27, 1939).

1. Information contained in the public files of the clerk of the court may not be obtained by a bill of particulars.

2. Information as to matters of evidence which is obtainable on interrogatories, may not be secured by a bill of particulars. (Rule 33)

**Subdivision (f)—Motion to Strike**

*Cal C. Chambers et al. v. Adolph Cameron et al.* (Northern District of Illinois, Eastern Division, WOODWARD, D. J., Oct. 3, 1939.)

A pleading containing redundant, immaterial and impertinent matter is objectionable and may be stricken.

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**RULE 13—Counterclaim and Cross-Claim—Subdivision (b)—Permissive Counterclaim**

*Paul Kohloff et al. v. Ford Motor Company.* (Southern District of New York, LEIBELL, D. J., July 24, 1939).

1. If plaintiff joins a claim for patent infringement with another claim for relief and voluntarily dismisses the former, the defendant may file a counterclaim for a declaratory judgment concerning the validity of the patents.

2. Plaintiff may voluntarily dismiss a claim for relief after answer is served if he gave notice of his intention to do so before such service and it appears that service was made to frustrate notice of withdrawal. (Rule 41 (a) (1))

*Cal C. Chambers et al. v. Adolph Cameron et al.* (Northern District of Illinois, Eastern Division, WOODWARD, D. J., Oct. 3, 1939.)

1. In an action brought by plaintiffs as trustees, the defendant may not file a counterclaim against them in their individual capacities.

2. An argumentative, verbose and prolix pleading, containing evidentiary matter, is objectionable and may be stricken. (Rule 8 (a))

3. A pleading containing redundant, immaterial and impertinent matter is objectionable and may be stricken. (Rule 12 (f))

**RULE 14—Third-Party Practice—Subdivision (a)—When Defendant May Bring in Third Party**

*Joe Crum v. Appalachian Electric Power Company v. Winisle Coal Company.* (Southern District of West Virginia, WATKINS, D. J., Sept. 9, 1939).

1. In a tort action the defendant may bring in a joint tort-feasor as a third-party defendant, if state law permits contribution as between joint tort-feasors.

2. An independent basis of jurisdiction is not necessary to support a third-party proceeding.

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**RULE 18—Joinder of Claims and Remedies—Subdivision (a)—Joinder of Claims**

*Richard A. Engler v. General Electric Company.* (Southern District of New York, MANDELBAUM, D. J., Sept. 19, 1939).

1. In the absence of diversity of citizenship, a claim for fraud may not be joined with one for patent infringement if the former does not rest upon the same facts as the latter. (Rule 12 (b))

2. Motion for a bill of particulars should be denied if a responsive pleading can be prepared without such information. (Rule 12 (e))

*Man-Sew Pinking Attachment Corporation v. Chandler Machine Company et al.* (District of Massachusetts, FORD, D. J., Sept. 27, 1939.)

A claim against one defendant charging unfair competition in advertising an alleged infringing device may not be joined with a claim against a different defendant for patent infringement in selling the infringing device.

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**RULE 19—Necessary Joinder of Parties—Subdivision (a)—Necessary Joinder**

*Orma L. Gibbs v. The Emerson Electric Manufacturing Company et al.* (Western District of Missouri, Western Division, REEVES, D. J., Sept. 19, 1939).

1. A joint owner of a patent right may not join his co-owner as a party defendant in an action for infringement nor may he compel such co-owner to join as a party plaintiff. Hence, the owner of a part interest in a patent may not maintain an infringement suit, if the other joint owner fails to join.

2. The rule that process may run anywhere within the territorial limits of the state in which the district court is held is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established place of business. (Rule 4 (f); Rule 82)

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**RULE 20—Permissive Joinder of Parties—Subdivision (a)—Permissive Joinder**

*Norma McNally v. Adrian Simons et al.* (Southern District of New York, GODDARD, D. J., July 19, 1939.)

Joinder of parties defendant is permissible if such joinder results in no substantial prejudice to a defendant and if delay, expense and inconvenience to witnesses will be lessened by such joinder.

*Man-Sew Pinking Attachment Corporation v. Chandler Machine Company et al.* (District of Massachusetts, FORD, D. J., Sept. 27, 1939.)

A claim against one defendant charging unfair competition in advertising an alleged infringing device

may not be joined with a claim against a different defendant for patent infringement in selling the infringing device. (Rules 18 (a) and 21)

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**RULE 21—Misjoinder and Non-Joinder of Parties**

*Man-Sew Pinking Attachment Corporation v. Chandler Machine Company et al.* (District of Massachusetts, FORD, D. J., Sept. 27, 1939.)

A claim against one defendant charging unfair competition in advertising an alleged infringing device may not be joined with a claim against a different defendant for patent infringement in selling the infringing device.

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**RULE 24—Intervention—Subdivision (b)—Permissive Intervention**

*United States of America v. United States Fidelity and Guaranty Company et al.* (Circuit Court of Appeals for the Tenth Circuit, BRATTON, C. J., Sept. 6, 1939).

The Equity Rules rather than the Federal Rules of Civil Procedure are applicable in determining whether intervention was properly allowed in a case in which judgment was rendered prior to the effective date of the Federal Rules of Civil Procedure, even though an appeal is heard subsequently.

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**RULE 26—Depositions Pending Action—Subdivision (b)—Scope of Examination**

*Margaret T. Bough et al. v. James B. Lee et al.* (Southern District of New York, LEIBELL, D. J., June 24, 1939).

1. In an action for personal injuries, defendant's attorney at the taking of his deposition must produce for inspection by plaintiff's attorney a statement previously given by the plaintiff to the defendant's insurer, if such statement is in the possession of defendant's attorney. (Rule 30 (b))

2. The delivery to defendant's attorney of a statement made by the plaintiff to defendant's insurer does not make such statement a privileged communication.

3. A party who has control over documents may be compelled to produce them even though they are not in his possession. (Rule 45 (f))

*Raphael E. Landry v. O'Hara Vessels, Inc.* (District of Massachusetts, FORD, D. J., Sept. 22, 1939).

The scope of discovery by interrogatories is as broad as that by deposition and anything that may be asked on oral examination may also be inquired into by interrogatories.

*Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation et al.* (Circuit Court of Appeals for the Second Circuit, AUGUSTUS N. HAND, C. J., July 31, 1939.)

In an action to obtain the issue of letters patent, the plaintiff may, by use of depositions, examine the person previously held to have been the prior inventor, to ascertain whether he has granted an exclusive license, since an exclusive licensee is an indispensable party to such an action. After ascertaining the facts in this manner, the licensee may be brought in as an additional party defendant, if the court has jurisdiction over him.

**RULE 30—Depositions Upon Oral Examination Subdivision (b)—Orders for the Protection of Parties and Deponents**

*Margaret T. Bough et al. v. James B. Lee et al.* (Southern District of New York, LEIBELL, D. J., June 24, 1939).

In an action for personal injuries, defendant's attorney at the taking of his deposition must produce for inspection by plaintiff's attorney a statement previously given by the plaintiff to the defendant's insurer, if such statement is in the possession of defendant's attorney.

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**RULE 33—Interrogatories to Parties**

*Harry S. Mann v. Cadillac Automobile Company of Boston.* (District of Massachusetts, SWEENEY, D. J., Sept. 19, 1939).

Even if a party moving for a bill of particulars states that the information is sought for the purpose of enabling him properly to prepare a responsive pleading and to prepare for trial, the motion should be denied if the information sought is properly the subject of interrogatories and a responsive pleading can be prepared without such information.

*Raphael E. Landry v. O'Hara Vessels, Inc.* (District of Massachusetts, FORD, D. J., Sept. 22, 1939).

1. The scope of discovery by interrogatories is as broad as that by deposition and anything that may be asked on oral examination may also be inquired into by interrogatories. (Rule 26 (b))

2. Interrogatories tending to incriminate, calling for an opinion, a conclusion of law, or the statement of a contention, are not proper.

*Hubert F. Laugharn v. Louis Zimmelman, et al.* (Southern District of California, JAMES, D. J., June 27, 1939).

Information as to matters of evidence which is obtainable on interrogatories, may not be secured by a bill of particulars.

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**RULE 36—Admission of Facts and of Genuineness of Documents—Subdivision (a)—Request for Admission**

*Richard C. Borden, et al. v. General Motors Corporation, et al.* (Southern District of New York, GALSTON, D. J., June 21, 1939).

Before the Federal Rules of Civil Procedure were made applicable to proceedings in copyright, Rule 36 (a), relating to requests for admissions, did not apply to copyright actions.

*Charles E. Kraus v. General Motors Corporation, et al.* (Southern District of New York, LEIBELL, D. J., July 25, 1939).

1. A party may be required to admit or deny the genuineness and the receipt by him of a specified letter and accompanying report but not the truth of all facts contained therein without specific designation of the particular relevant facts which the moving party seeks to have admitted.

2. A notice requesting the admission of facts and genuineness of documents need not designate the time within which the admissions or denials shall be made, since the Rule expressly fixes such time at 10 days.

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**RULE 41—Dismissal of Actions—Subdivision (a) —Voluntary Dismissal: Effect Thereof Paragraph (1)—By Plaintiff; By Stipulation**

*Paul Kohloff et al. v. Ford Motor Company.*

(Southern District of New York, LEIBELL, D. J., July 24, 1939).

Plaintiff may voluntarily dismiss a claim for relief after answer is served if he gave notice of his intention to do so before such service and it appears that service was made to frustrate notice of withdrawal.

**Paragraph (2)—By Order of Court**

*Lawson v. Moore at al.* (Western District of Virginia at Danville, DOBIE, D. J., Sept. 20, 1939).

Dismissal of an action which has been removed from a state to the Federal court should not be conditioned upon any further litigation being had in the Federal court, it appearing that if another suit was brought in the state court for less than $3,000 it could be reached for trial sooner than an action in the Federal court.

*Western Union Telegraph Company v. Florence Dismang.* (Circuit Court of Appeals for the Tenth Circuit, PHILLIPS, C. J., Aug. 30, 1939).

1. Plaintiff may not dismiss an action without prejudice after judgment.

2. The court may not set aside a judgment, without a showing of legal grounds therefor or excuse for the moving party's negligence or default, solely for the purpose of restoring the proceeding to a status whereby plaintiff might effectually move to dismiss without prejudice. (Rule 60 (b))

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**RULE 42—Consolidation; Separate Trials—Subdivision (a)—Consolidation**

*Maxine Cecil v. Missouri Public Service Corporation, Wilma Frances Cecil v. Missouri Public Service Corporation, H. B. Cecil v. Missouri Public Service Corporation, Betty Cecil v. Missouri Public Service Corporation.* (Western District of Missouri, Western Division, OTIS, D. J., Sept. 9, 1939).

1. Four actions for personal injuries against the same defendant, in which the injuries are alleged to have been caused at the same time by the same negligence, all issues being identical except the extent of each plaintiff's injuries, should be consolidated notwithstanding objection by plaintiffs.

2. Consolidation of cases for trial does not deprive parties of their constitutional right of trial by jury.

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**RULE 43—Evidence—Subdivision (a)—Form and Admissibility**

*Aetna Life Insurance Company v. Frieda May McAdoo.* (Circuit Court of Appeals for the Eighth Circuit, STONE, C. J., Sept. 12, 1939).

In an action on a life insurance policy tried before the effective date of the Rules, the defendant-appellant urged as error in the Circuit Court of Appeals the exclusion at the trial of statements made by an insured as to his health. It appeared that the State rule would exclude the evidence but the Federal rule would admit it. *Held*, since the judgment had to be reversed on other grounds and a new trial granted, Rule 43 (a) would admit the evidence on re-trial, and consequently, it was unnecessary to resolve the conflict between the two rules of evidence. (Rule 86)

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**RULE 45—Subpoena—Subdivision (b)—For Production of Documentary Evidence**

*Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.* (Southern District of New York, CONGER, D. J., July 11, 1939.)

A person may not refuse to obey a subpoena duces tecum. He should either move to quash the subpoena or produce the papers so that the court may pass on their admissibility.

**Subdivision (f)—Contempt**

*Margaret T. Bough et al. v. James B. Lee et al.* (Southern District of New York, LEIBELL, D. J., June 24, 1939).

A party who has control over documents may be compelled to produce them even though they are not in his possession.

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**RULE 50—Motion for a Directed Verdict—Subdivision (b)—Reservation of Decision on Motion**

*Lester R. Bachner v. Eickhoff & Co., Inc.* (Southern District of New York, BYERS, D. J., March 29, 1939).

The court, after reserving decision on plaintiff's motion for a directed verdict, has the power, on plaintiff's motion, to set aside verdict for the defendant and to enter judgment for the plaintiff.

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**RULE 52—Findings by the Court—Subdivision (a)—Effect**

*The Western Union Telegraph Company v. Paul Nester at al.* (Circuit Court of Appeals for the Ninth Circuit, HANEY, C. J., Sept. 15, 1939).

In an action for breach of contract brought prior to but decided after the effective date of the Federal Rules of Civil Procedure, such rules are applicable and consequently findings of fact will not be set aside unless clearly erroneous.

*Porto Rican American Tobacco Company v. City Bank Farmers Trust Company et al.* (Southern District of New York, WOOLSEY, D. J., June 29, 1939).

1. Findings of fact and conclusions of law separately numbered should be filed in all non-jury cases.

2. Counterfindings need not be submitted by the defeated party.

3. Procedure outlined for preparation and submission of findings of fact and conclusions of law.

*The Anglo California National Bank of San Francisco et al v. Jean Lazard et al.* (Circuit Court of Appeals for the Ninth Circuit, WILBUR, C. J., Sept. 7, 1939).

In a jury-waived action at law in which judgment was entered prior to the effective date of the new Rules but which was decided on appeal after such date, the question of the sufficiency of the evidence to support the findings should be determined in accordance with the pre-existing rule that such findings should not be disturbed if there was substantial evidence to support them. Concurring opinion contra on this point.

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**RULE 54—Judgments; Costs—Subdivision (d)—Costs**

*Annie Lazar v. Cecelia Company.* (Southern District of New York, LEIBELL, D. J., Sept. 22, 1939).

When a motion to quash service of process is referred to a special master and the adverse party incurs expenses in producing witnesses as a result of such reference, if the moving party subsequently abandons his motion, the adverse party is entitled to immediate

reimbursement for such expenses, without awaiting the outcome of the action.

*Federal Deposit Insurance Corporation v. John C. Casady et al.* (Circuit Court of Appeals for the Tenth Circuit, WILLIAMS, C. J., Sept. 25, 1939).

The Federal Deposit Insurance Corporation being a governmental agency, costs may not be recovered against it.

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**RULE 56—Summary Judgment—Subdivision (a)—For Claimant**

*Hartford Accident & Indemnity Co. v. Lloyd Flanagan.* (Southern District of Ohio Western Division, NEVIN, D. J., June 27, 1939).

In an action brought by the surety on a fiduciary bond against the principal to recover indemnity for loss plaintiff was obliged to pay, plaintiff's motion for summary judgment was granted, it appearing that the facts were not in dispute and that the affirmative defenses were insufficient in law.

*City National Bank of Philadelphia v. Montrose Industrial Bank.* (Eastern District of New York, CAMPBELL, D. J., Sept. 20, 1939).

Summary judgment for plaintiff may be granted after affirmative defenses which present the only issues in the case have been stricken for insufficiency.

*New York Credit Men's Association v. Herman Chaityn.* (Southern District of New York, LEIBELL, D. J., July 24, 1939).

In an action by a trustee in bankruptcy to recover certain preferential payments made to an unsecured creditor, a motion for summary judgment was granted when the defendant admitted payment and when affidavits on file conclusively showed that the defendant must have known the bankrupt was insolvent at the time payment was made.

*Louise M. Saunders et al. v. Joseph T. Higgins.* (Southern District of New York, BONDY, D. J., July 21, 1939).

1. Motion for summary judgment should be denied if the court, upon the entire record, is unable to find that a trial would be a useless form.

2. Affidavits in support of a motion for summary judgment should contain only statements which would be admissible in evidence. (Rule 56 (e) )

**Subdivision (b)—For Defending Party**

*Max Sherover v. John Wanamaker, New York.* (Southern District of New York, LEIBELL, D. J., June 19, 1939).

A motion to dismiss the complaint on the ground it fails to state a claim must be limited to the pleadings and may not be supported by affidavits. Where affidavits are relied upon, the proper motion is for summary judgment.

*Walter F. Downey v. Edith S. Palmer.* (Southern District of New York, LEIBELL, D. J., June 20, 1939).

1. Motion for summary judgment should be granted if the defendant pleads the statute of limitations and it appears that the action is barred.

2. In the absence of a Federal statute of limitations, the applicable state statute controls. (Rule 2)

[EDITORIAL NOTE: On the question of statute of limitations, see editorial note on *Partridge v. Ainley* in 41 Bull. 1.]

*Josephine McGrath v. Helena Rubinstein, Inc.* (Southern District of New York, JOHN W. CLANCY, D. J., July 17, 1939).

1. Motion for summary judgment should be granted if the defendant pleads the statute of limitations and it appears that the action is barred.

2. Motion for summary judgment should be denied if the defendant pleads *res adjudicata* and it does not appear that the parties and issues involved in the former action are the same as those involved in the present case.

3. In the absence of a Federal statute of limitations, the applicable state statute controls. (Rule 2)

[Editorial Note: On the question of statute of limitations, see editorial note on *Partride v. Ainley*, in 41 Bull. 1.]

**Subdivision (c)—Motion and Proceedings Thereon**

*Banco de Espana v. Federal Reserve Bank of New York, Banco de Espana v. United States Lines Company et al., Banco de Espana v. Sigmund Solomon.* (Southern District of New York, LEIBELL, D. J., July 15, 1939).

Suspicions are not sufficient to raise a genuine issue of fact and consequently motion for summary judgment will not be denied merely because of suspicions advanced by counsel for adverse party.

**Subdivision (e)—Form of Affidavits; Further Testimony**

*Louise M. Saunders et al. v. Joseph T. Higgins.* (Southern District of New York, BONDY, D. J., July 21, 1939).

Affidavits in support of a motion for summary judgment should contain only statements which would be admissible in evidence.

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**RULE 60—Relief from Judgment or Order—Subdivision (b)—Mistake; Inadvertence; Surprise; Excusable Neglect**

*Western Union Telegraph Company v. Florence Dismang.* (Circuit Court of Appeals for the Tenth Circuit, PHILLIPS, C. J., Aug. 30, 1939).

The court may set aside a judgment, without a showing of legal grounds therefor or excuse for the moving party's negligence or default, solely for the purpose of restoring the proceeding to a status whereby plaintiff might effectually move to dismiss without prejudice.

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**RULE 66—Receivers**

*Donald Bicknell et al. v. Marjorie Fleming Lloyd-Smith.* (Eastern District of New York, CAMPBELL, D. J., Sept. 11, 1939).

A receiver appointed by a State authority in a State other than that in which the Federal court is held, may not sue in a Federal court, but an ancillary receiver must be appointed for that purpose. This principle has not been modified by the new Rules. The rule is otherwise if the receiver takes title to the cause of action.

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**RULE 73—Appeal to a Circuit Court of Appeals—Subdivision (g)—Docketing and Record on Appeal**

*In the Matter of The Prudence Company, Inc., Debtor. In the Matter of the Application of the Reconstruction Finance Corporation relating to the George E. Eddy appeal.* (Eastern District of New York, MOSCOWITZ, D. J., Sept. 19, 1939).

1. Service by appellant of a designation of the record on the thirty-eighth day of the forty-day period within which the record must be filed with the appellate court is too late, since it does not afford appellee the

ten days provided by the Rules within which to file a counter-designation.

2. Appellant may not secure certification of the record in accordance with the designation which he has filed without regard to any counter-designation which might be filed by appellee.

3. Questions regarding the validity and adequacy of a record on appeal should be determined by the Circuit Court of Appeals rather than the District Court.

**RULE 81—Applicability in General—Subdivision (a) (1)—To What Proceedings Applicable**

*Richard C. Bordon, et al. v. General Motors Corporation, et al.* (Southern District of New York, GALSTON, D. J., June 21, 1939).

Before the Federal Rules of Civil Procedure were made applicable to proceedings in copyright, Rule 36 (a), relating to requests for admissions, did not apply to copyright actions. (Rule 36 (a))

**RULE 82—Jurisdiction and Venue Unaffected**

*Orma L. Gibbs v. The Emerson Electric Manufacturing Company et al.* (Western District of Missouri, Western Division, REEVES, D. J., Sept. 19, 1939).

The rule that process may run anywhere within the territorial limits of the state in which the district court is held is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established place of business.

**RULE 86—Effective Date**

*United States of America v. United States Fidelity and Guaranty Company et al.* (Circuit Court of Appeals for the Tenth Circuit, BRATTON, C. J., Sept. 6, 1939).

The Equity Rules rather than the Federal Rules of Civil Procedure are applicable in determining whether intervention was properly allowed in a case in which judgment was rendered prior to the effective date of the Federal Rules of Civil Procedure, even though an appeal is heard subsequently. (Rule 24 (b))

*Aetna Life Insurance Company v. Frieda May McAdoo.* (Circuit Court of Appeals for the Eighth Circuit, STONE, C. J., Sept. 12, 1939).

In an action on a life insurance policy tried before the effective date of the Rules, the defendant-appellant urged as error in the Circuit Court of Appeals the exclusion at the trial of statements made by an insured as to his health. It appeared that the State rule would exclude the evidence but the Federal rule would admit it. *Held,* since the judgment had to be reversed on other grounds and a new trial granted, Rule 43 (a) would admit the evidence on re-trial, and consequently it was unnecessary to resolve the conflict between the two rules of evidence.

*The Western Union Telegraph Company v. Paul Nester et al.* (Circuit Court of Appeals for the Ninth Circuit, HANEY, C. J., Sept. 15, 1939).

In an action for breach of contract brought prior to but decided after the effective date of the Federal Rules of Civil Procedure, such rules are applicable and consequently findings of fact will not be set aside unless clearly erroneous. (Rule 52 (a))

*The Anglo California National Bank of San Francisco et al v. Jean Lazard et al.* (Circuit Court of Appeals for the Ninth Circuit, WILBUR, C. J., Sept. 7, 1939).

In a jury-waived action at law in which judgment was entered prior to the effective date of the new Rules but which was decided on appeal after such date, the question of the sufficiency of the evidence to support the findings should be determined in accordance with the pro-existing rule that such findings should not be disturbed if there was substantial evidence to support them. Concurring opinion contra on this point. (Rule 52 (a))

# DECISIONS ON FEDERAL RULES OF CIVIL PROCEDURE

Cumulative alphabetical list of cases published in Department of Justice Bulletins 1 to 44, inclusive, that are also reported in Federal Reporter system.—This list supplants all prior lists of citations to the Federal Reporter system.

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**Rule 1**

Moon v. Pac. Mut. Life Ins. Co. (S. D. W. Va.) 28 F. Supp. 199.

**Rule 2**

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*Subdivision (c)*

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*Subdivision (d)*

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Hedrick v. Canadian Pac. Ry. Co. (S. D. Ohio) 28 F. Supp. 257.
Massachusetts Farmers Defense Committee v. United States et al. (D. Mass.) 26 F. Supp. 941.
Pioneer Utilities Corporation v. Scott-Newcomb, Inc. (E. D. N. Y.) 26 F. Supp. 616.

*Subdivision (f)*

Devier v. George Cole Motor Co. et al. (W. D. Va.) 27 F. Supp. 978.

**Rule 5**

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*Subdivision (b)*

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Co., Inc., et al. (C. C. A. 2) 104 F. (2d) 302.

**Rule 6**

*Subdivision (b)*

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Hofmann, Inc., Alfred, v. Textile Mach. Works (E. D. Pa.) 27 F. Supp. 431.
Kohloff et al. v. Ford Motor Co. (S. D. N. Y.) 27 F. Supp. 803.
Rogers v. Montgomery Ward & Co., Inc. (S. D. N. Y.) 26 F. Supp. 707.

**Rule 7**

*Subdivision (a)*

Fried v. Warner Bros. Circuit Management Corporation et al. (E. D. Pa.) 26 F. Supp. 603.

*Subdivision (b)*

Hammond - Knowlton v. Hartford - Connecticut Trust Co. of Hartford, Conn. (D. Conn.) 26 F. Supp. 292.

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# ADMINISTRATIVE AGENCIES AS LEGISLATORS AND JUDGES

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by experts freed from all extraneous influences—we must have prejudice and the possibility of error. Moreover, while mathematical or scientific standards of an expert may be possible as to foods and drugs, in fields of social and economic policy such standards are not possible; equally trained experts may reach different results, and the conclusion of the expert depends largely upon his point of view. A clear illustration of this is found in the recent determination of a bargaining unit by the National Labor Relations Board (*In re Pittsburg Plate Glass Co.*), with a vigorous dissent by the most expert member of the Board.[48]

It is also of importance to bear in mind that speed, which is an essential of administrative adjudication, may sometimes have its disadvantages. Dean Landis has properly said:

"A further factor that makes against administrative adjudication having those qualities that it should appropriately have is that the members of an administrative agency rarely have the time and opportunity for thoroughly scrutinizing a record and coming to their own conclusions as to what it establishes."

This factor is confirmed by authoritative statements with respect to the National Labor Relations Board and the Securities and Exchange Commission.[49] An able article by Judge Charles S. Lobingier in the October, 1939, number of the Journal of the American Judicature Society clearly brings out the fact that the trial examiner of an administrative body (and not the body itself) is responsible for the record and for the findings which may properly lay the basis for favorable judicial review; and Mr. Chester T. Lane and others have emphasized the necessity for greater responsibility and higher standards of personnel of such trial examiners. The person who holds the hearing should have the direct responsibility for the decision, with a right in the parties to seek an administrative review before the board or commission. Wisconsin adopted such a plan in 1933 after years of experience with board decisions in workmen's compensation cases when no member of the board had been present at the hearing.

Another factor in administrative adjudication is well indicated by Dean Landis:

"The process of administrative adjudication has a greater susceptibility to interference from members of the executive and legislative departments than the same process has when pursued by a court. It is neither unusual, nor is it considered contrary to the rules of the game, except by a sensitive few, to speak or write a word for a party under scrutiny in an administrative proceeding."[50]

It is obvious that if safeguards are to be imposed upon administrative adjudication, they cannot be imposed by the executive or legislative departments. If safeguards are to be imposed they must operate through the judicial department, not only because adjudication is its function but also because it is more remote from political influences. This is not based on any claimed sanctity or infallibility of the courts, but on the fact of human fallibility which may particularly appear where an administrative body is in a position to exercise arbitrary power. The rejection of any plan of judicial review could be based only on a theory of administrative infallibility and administrative impartiality in the exercise of powers much more liable to abuse than are the judicial powers. Judicial review merely protects the individual against the arbitrary power of a single official or group of officials, and within proper limitations, does not restrict or injure the efficiency of the administrative process.

It may here be pointed out that judicial review of administrative adjudications does not mean that every administrative decision should be carried to the courts. The purpose of administrative adjudication is to have a simple and speedy procedure which will, where possible, finally determine all issues. It is for this reason that the administrative law bill now before Congress provides for the establishment of intra-departmental boards for the purpose of extending administrative adjudication to cases where it does not now exist. A private contractor with the national government may have been refused certain payments or credits by a subordinate officer. The whole matter may perhaps be determined by an impartial departmental board, whereas he would otherwise be required to go to the Court of Claims or to the United States District Court. Administrative adjudication is to be encouraged, and its success is to be measured by the smallness in number of appeals and by the proportion of such appeals in which its findings are approved.[51] Frequent appeals and frequent reversals are evidences of failure upon the part of the administrative body, and variations in the number of such appeals serve as a measure of its increasing or decreasing efficiency, and it may properly be said that administrative bodies which have passed beyond

48. 7 United States Law Week, 313 (Oct. 3, 1939).

49. Landis, The Administrative Process, 105; and papers by Madden, Gelhorn and Linfield, and Lane, cited in Note 43. The United States Supreme Court has held that "the officer who makes the determinations must consider and appraise the evidence which justifies them," but at the same time recognizes the necessity of using assistants to prosecute inquiries, take evidence, and to sift and analyze such evidence. *Morgan v. United States*, 298 U.S. 468 (1936).

50. Landis, The Administrative Process, page 101.

51. This is not altogether true. Where a record must be paid for by the party seeking review, and the testimony is voluminous, the cost may in fact preclude judicial review. Stop orders or even the institution of proceedings for such orders under the Securities Act destroy the possibility of a market, and judicial review in fact constitutes no remedy. Here efforts to obtain such review would naturally be few in number. The parties are subject to the mercy of the administrative body, whatever may be the statutory scope of review. Landis, The Administrative Process, 108; Lane in Handbook of the Association of American Law Schools, 1938, page 198.

the experimental stage have a record equally as good as or better than the trial courts. Judicial review is, and will, normally be used only in cases where there is thought to be obvious abuse or error, and should be limited to the prevention of abuse or error, without interference with the proper exercise of administrative authority.[52]

In two cases decided at its 1938 term, the United States Supreme Court has brought substantially all, if not all, federal administrative hearings within the scope of judicial review, and within certain standards to be applied in the exercise of that review. In *Rochester Telephone Corporation v. United States*[53] the court abandoned the unsatisfactory view that "negative orders" were not subject to review. In *Shields v. Utah Idaho Central Railroad Co.*[54] the court said that in the absence of statutory provision for judicial review the party was entitled to resort to equity to obtain a judicial review of the validity and effect of a determination by the Interstate Commerce Commission.

That court has also determined what are the requisites of a fair hearing under the due process clauses of the 5th and 14th Amendments, although some of its decisions upon this matter have been based upon the language of specific federal statutes. It would appear, however, that the following elements must be present, if administrative action is to be sustained:

(1) The administrative body must have acted within its authority, that is, within the powers conferred upon it and in the manner provided by law;[55]

(2) There must be notice and an opportunity to be heard;[56]

(3) There must be "a reasonable opportunity to know the claims of the opposing party and to meet them";[57]

(4) A finding may not be based on undisclosed facts;[58]

(5) The procedure must be consistent with the essentials of a fair trial;[59]

(6) The findings must be based on "substantial evidence" and must not be arbitrary and capricious;[60]

(7) "Mere uncorroborated hearsay or rumor" or a mere scintilla of evidence do not suffice, but there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[61]

The standards so established by the United States Supreme Court are, with some variations in language, made the standards of the administrative law bill now pending in Congress. In this respect the bill would codify and make uniform the scope of review over federal administrative finding and orders. Some federal statutes now provide that administrative findings shall be conclusive "if supported by evidence," but the court has construed this to require "substantial evidence," and the term "substantial evidence" has been used in a number of later statutes.[62] And apparently without any difference in intended policy, the Commodity Exchange Act provides that an order shall be set aside if "unsupported by the weight of the testimony."

The proposed administrative law bill now pending in Congress proceeds on the proper assumption that if administrative agencies are constituted with a fair degree of efficiency and impartiality—and they must be so constituted in order to survive—it is wasteful and useless to provide for a judicial trial *de novo* upon all or any of the issues; or for the courts to weigh the evidence presented before the administrative agency for the purpose of determining the wisdom of the administrative action. In reviewing action by the Interstate Commerce Commission the United States Supreme Court properly said that "if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the commission's action."[63] Experience with workmen's compensation not only shows the futility of judicial administration of compensation but also waste and delay without advantage in the judicial trial of issues *de novo* or in the judicial weighing of evidence to determine whether it would have reached the same result as did the administrative body.[64] Sufficient protection is accorded by the right to a judicial review which canalizes administrative action within the powers conferred, requires a fair hearing, and findings based upon substantial evidence in the record. In the great mass of cases the quality of justice must be determined by an original hearing, whether administrative or judicial, and, where the hearing is administrative, the function of judicial review is not to decide upon the merits but to make sure that the administrative proceeding has given adequate consideration to the merits. And in this connection, the distinction between issues of law and issues of fact has something of practical value in avoidance of judicial weighing of evidence to determine the merits, although, as is the case with substantially all classification in the legal and social sciences, it is impossible to draw a precise line between the two types of issues.[65]

It is true, of course, that no proposed statute will alter the view taken by the United States Supreme Court as to trial *de novo* or weighing evidence with respect to certain jurisdictional and constitutional facts.[66] The author of the present article doubts the value of the rule laid down by the court in this respect. Because of the limited field to which it applied,

52. The scope of judicial review has been thoroughly discussed in essays recently appearing in this Journal, by Malcolm McDermott (June, 1939); Charles B. Stephens (July, 1939); Kenneth C. Davis (September, 1939); and Clyde Duffy (October, 1939). See also Albert S. Faught, Judicial Review of Administrative Agencies, 24 American Bar Association Journal, 897 (1938).

53. 307 U.S. 125, 59 S.Ct. 754.

54. 305 U.S. 177, 59 S.Ct. 160.

55. *Shields v. Utah-Idaho Central Railroad Co.*, 305 U.S. 177, 59 S.Ct. 160; *Interstate Commerce Commission v. Union Pacific R.R.* 222 U.S. 541, (1912).

56. *R.R. Com. of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 58 S.Ct. 334 (1938).

57. *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773 (1938).

58. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S.Ct. 724 (1937).

59. See cases in notes 56 and 57.

60. See cases in notes 55, 56 and 61.

61. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206; *National Labor Relations Board v. Columbia Enameling and Stamping Co.*, 306 U.S. 292, 59 S.Ct. 501.

62. The term "evidence" is used in the Federal Trade Commission Act, the Securities Act of 1933 and the National Labor Relations Act. The term "substantial evidence" is used in the Public Utility Holding Company Act of 1935; the Federal Food, Drug and Cosmetic Act of 1938, and the Fair Labor Standards Act of 1938. This list is not complete, but is used merely to indicate that there has been no congressional policy in the use of terms.

63. *Chicago, R. I. & Pacific Ry. v. U. S.*, 274 U.S. 29 (1927).

64. See analysis in Dodd, Administration of Workmen's Compensation, 346-407.

65. The distinction is fully discussed in Dickinson, Administrative Justice and the Supremacy of Law, 49-55, 159-174, 307-332.

66. For analysis of cases on this matter see Oppenheimer, The Supreme Court and Administrative Law, 37 Columbia Law Rev. 1 (1937).

*Crowell v. Benson*[67] occasions no difficulty, but there would be no injury in requiring all jurisdictional evidence under the Longshoremen's and Harbor Workers' Act to be submitted on the hearing by the deputy commissioner under that act, with no power in the court to re-try the issue, but with full and complete power in the court to determine whether, upon the evidence appearing in the administrative record, there had been an excess of authority or of jurisdiction. As Mr. Justice Brandeis indicated in this case, all interests would be equally safeguarded, and the administrative process becomes a less cumbersome and less expensive means of determining the controversy rather than "an inquiry preliminary to a contest in the courts."

In *St. Joseph Stock Yards Co. v. United States*,[68] the court said that the judicial authority to examine the weight of evidence "applies when rights either of person or property are protected by constitutional restrictions." Mr. Justice Brandeis sought to distinguish and limit this authority to cases involving the right to personal liberty. As to personal liberty the issue has chiefly presented itself in habeas corpus proceedings involving a claim to citizenship by a person seeking admission to, or who is sought to be deported from, this country. If citizenship exists there is no jurisdiction to exclude or deport. In *Ng Fung Ho v. White*,[69] the court held that certain petitioners were entitled to a judicial trial of a claim of citizenship where "they supported the claim by evidence, sufficient, if believed, to entitle them to a finding of citizenship." This opinion is sustainable on the ground that the issue of jurisdiction was not supported by substantial evidence. In the later case of *Quon Quon Poy*[70] judicial review as to the issue of citizenship was denied where there was "adequate support in the evidence." In view of the rapid expansion of governmental regulation of rate and price fixing, the *St. Joseph Stock Yards* case is of particular importance with respect to the scope of judicial review of administrative action. The constitution protects against a confiscatory price or rate; the burden is upon the complaining party to show that the rate is clearly confiscatory, which he cannot do if there is substantial evidence in its support; and the court properly has authority to determine from the record whether the rate is supported by substantial evidence. If this is the limit of the court's function in weighing the evidence, it involves no new or additional standard. It is not only the function, but it is the duty, of a court to examine the record and to weigh the evidence to the extent of determining whether there is substantial evidence to support the administrative finding. The fact that the rate achieved by administrative adjudication is termed a legislative act is not material.

The same general plan for judicial review can best be used for substantially all federal administrative tribunals whose proceedings affect individual rights, whether of person or property. Differences in administrative structure are often necessary because of differences in function; but wherever an individual is entitled to an administrative hearing and judicial review thereof, these may best be obtained by uniformity in a simplified administrative procedure with rules of evidence less restrictive than those of the courts[71] and by a uniform scope and method of judicial review.[72] As in the matter of establishing regulations and standards, the specific problems vary, but the methods may be the same. For example, much the same method for the establishment of standards is appropriate equally for foods and drugs and for minimum wages of labor. Material variations will involve serious complexity without compensating advantages and may re-establish in another field of law something akin to the common law remedies which it has taken so long to abolish.

It has been suggested that greater efficiency may be produced by establishing a special administrative court to review decisions of federal administrative agencies. Review is now in the United States District Courts in some cases, but more generally in the United States Circuit Courts of Appeals, and the administrative law bill now pending in Congress provides for review by the Circuit Courts of Appeals in their respective circuits (including the United States Court of Appeals for the District of Columbia).

A bill introduced in the United States Senate early in 1938 would have transferred judicial review with respect to 16 important administrative agencies to a proposed United States Court of Appeals for Administration, composed of eleven members, sitting in divisions, and located in the District of Columbia, but with power in the chief justice of the court to have a division of the court hold special sessions in any part of the United States "whenever, in the opinion of the chief justice, the convenience of the public or of the parties may be promoted or delay or expense prevented thereby."[73] By the terms of the bill, the chief justice and associate justices were each authorized to constitute a division of the court for the purpose of hearing and deciding appeals coming before the court, and judgments of the proposed court were to be final, but subject to review on certiorari by the United States Supreme Court.

Hearings on this bill were held by a sub-committee of the Committee on the Judiciary of the United States Senate from April 1, 1938, to June 1, 1938. The chief arguments in support of an administrative court of review were that, where review is now by circuit courts of appeals, it substitutes one tribunal for eleven; and that judges sitting continuously in such a court will become specialists in the field of administrative law, and that similar specialization and expert knowledge cannot be developed in the eleven circuit courts of appeals or in the district courts so far as they now act as bodies reviewing administrative action. The arguments in favor of the administrative court bill constitute the chief reasons for opposing it. In the first place, it proposed to set up a single centralized court in Washington; for, although provision was made by which divisions of the court might sit elsewhere, it was unlikely that they would do so frequently, if at all. A court familiar with local conditions would be avoided

67. 285 U.S. 22, 52 S.Ct. 285 (1932).

68. 298 U.S. 38, 56 S.Ct. 720 (1936). See also *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797.

69. 259 U.S. 276, 42 S.Ct. 492 (1922).

70. 273 U.S. 352, 47 S.Ct. 346 (1927).

71. The statement in the text above is made after full consideration of distinctions indicated by Messrs. Duffy and Faught in articles referred to in note 52. More simplified procedure in the courts has made great progress in recent years. Relaxation of rules of evidence in the courts is under way, and the experience under workmen's compensation laws is of value. See Dodd, Administration of Workmen's Compensation, pages 224-242. For rules of evidence before administrative bodies, see Harold M. Stephens, Administrative Tribunals and the Rules of Evidence (1933), and Albert E. Stephan, The Extent to which Fact-Finding Boards Should be Bound by Rules of Evidence, 24 American Bar Association Journal, 630 (1938).

72. Some variations are necessary. For example, claims under the Federal Longshoremen's and Harbor Workers' Compensation Act must of necessity go to the United States District Courts because they are more convenient.

73. Seventy-Fifth Congress, Third Session, S. 3676.

and a large additional expense would be involved in a judicial review at Washington. In return for such expense the person seeking court review would necessarily obtain it only from a body of judges (or rather from a single member of such body) sitting in the atmosphere of the central administrative bodies whose actions it was reviewing, and in close daily contact with such bodies. In such an atmosphere, some degree of sympathy with the point of view of the administrative bodies could not be avoided, and judicial review would of necessity cease to possess the impartiality necessary for the protection of private rights.

It was urged that the disadvantages of a single centralized judicial review of all federal administrative determinations would be more than offset by obtaining a uniformity of opinions which it was contended, could not be had through eleven circuit courts of appeals and through single or three-judge actions by district courts. The same argument may be used to urge that all circuit courts of appeals be consolidated into a single court, for review of administrative action constitutes a large part of their work, and will require an increasing portion of their time. Some lack of uniformity of judicial opinion will always present itself upon the initiation of new legislative policies, and troubles occasioned by such diversity are usually ironed out within a reasonably short time. The initial diversity of views among several courts with respect to new legislation aids in a prompt and effective solution of this problem, and, under either plan, the solution must finally come from the United States Supreme Court. Experience with the Commerce Court (1910-1913) clearly indicates that the function of the United States Supreme Court was not reduced by the creation of a specialized court limited to only one of the sixteen subjects of jurisdiction sought to be united by the recent administrative court bill. Moreover, by the simple device of immediate certification of disagreement to the United States Supreme Court, as is provided in the pending administrative law bill, diversities of view in circuit courts of appeals may be promptly adjusted.

It was further urged that the creation of a special court for the review of administrative actions will make it possible to develop experts or specialists in such a court. This point of view was emphasized by the provision in the administrative court bill that the chief justice and associate justices of the proposed court "shall be selected solely with regard to their qualifiations and fitness to perform the special duties of the court." It is doubtful whether a court of eleven members, sitting in divisions, could as a court, develop expertness in review of the United States Board of Tax Appeals, the Processing Tax Board of Review of the Treasury Department, the Interstate Commerce Commission, the Federal Communications Commission, the Commodity Exchange Commission, the Federal Power Commission, the Federal Trade Commission, the National Labor Relations Board, the Securities and Exchange Commission, and in six other independent fields, including orders under the Packers and Stock-Yards Act and of the Federal Alcohol Administration; and expertness by the court as a body in these several fields, even if it were desirable in judicial review, could not have been achieved by the provision in the administrative court bill that "the justices to constitute each section shall from time to time be designated by the chief justice with due regard to their several qualifications by way of learning, experience and special training for the work of the section to which they are assigned," in order that related cases might be handled by justices "who are expert and experienced in the subject matter thereof." It is clear that the purpose of the administrative court bill was to place judicial review of administrative action in the hands of a single expert sitting in a specialized court with experts in other fields, although there was a limited possibility of review by the whole court.

Assuming that the several judges of a separate court to review administrative decisions were experts and specialists in their respective fields, this should be the strongest argument against creating such a court. The expert or specialist in a particular field is needed in the administrative investigation, in the administrative hearing, and in the administrative review (if such review is provided, as in most state workmen's compensation laws, and to the United States Board of Tax Appeals). But an adequate judicial review of administrative action should be based on issues of law and upon general familiarity with the law, independently of specialization. The judicial review should be of a broader scope than that of the specialist close to the administrative function of enforcement. This is essential to the protection of the parties. Judicial review of administrative determinations should be an independent review of the action of the specialist. In such a review the point of view of the technical expert is to be avoided, and under a special administrative court this avoidance would come only if the United States Supreme Court should take jurisdiction on writ of certiorari. The function of the expert is performed in investigation and in administrative hearing and review. Judicial review deals not so much with technical facts as with fairness of hearing—a matter not for technical experts but for impartial courts.

For some time there has been no advocacy of a federal administrative court, and there is little possibility of our having one. The English Committee on Ministers' Powers advised *"without hesitation"* against the adoption of a system of administrative courts.[74] Mr. Harold Laski saying:

> "No gain which might result therefrom in flexibility of construction seems to me to counterbalance the value of the independent assessment of statutory intention which is now afforded by the ordinary courts. The historic principle of the rule of law cannot, I think, be better protected than by making the ordinary judges the men who decide the legality of executive action."

Dean Landis has expressed the opinion that "our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions."[75] Review by a competent body is desired, but expertness with respect to the various details of each administrative body should not be stressed. What we need is an external check by persons qualified by independence and ability to assure fair play in the administrative process. The expert has his place, but it is not his function to act as a judge in review of the actions of another expert in the same field. The judge who sits in all types of cases is not an expert in the narrower sense, but his breadth of view gives him an expertness necessary to keep the expert within the bounds of his authority.

The possibility of error in the trial court makes it necessary to have courts of review. There is no less possibility of error in an administrative tribunal acting with what has been termed a "proper bias" in favor

74. Committee on Ministers' Powers Report, 1932, pp. 110, 135.

75. Landis, The Administrative Process, 152.

of the results which it seeks, operating with a more summary procedure, acting of necessity in close cooperation with the political departments of government, and primarily concerned with getting things done rather than with the method of doing them. Yet within proper bounds such an administrative tribunal has an important and essential task in our governmental structure.

## CONCLUSION

Much that has recently been written in the field of administrative law is controversial in character and rests upon the assumption that a sense of "battle dominates the question of judicial review over administrative action."[76] And an analogy is sometimes drawn from the conflict between Coke and Ellesmere—between common law and equity—in the time of King James I. Such an attitude is futile, and would lead to highly undesirable results if it should bring about two systems of law which it would again require centuries to merge. There is no battle. The administrative process is essential in our law, and a proper scope of judicial review is an essential part of the administrative process.

It is true that adjustment is difficult when many new administrative tribunals are created, and are in the earlier stages of their growth so that of necessity they have not developed either definite policies or procedures. These characteristics of early youth make equal difficulty for the administrative tribunals and the courts, but their solution is primarily one for the administrative body. The Interstate Commerce Commission is but an example of this solution. Relatively few of its determinations are challenged in the courts—less than one in each one hundred between 1920 and 1930. And the relative functions of court and commission have been well stated by Professor Sharfman:

"There is little questioning today of the desirability of the prevailing relationship between the Commission and the Courts. Judicial review of matters of law is obviously essential. The safeguards provided against unconstitutional assertions of power, whether through the Congressional enactments as such or through the administrative orders based thereon, are but a concrete recognition in this province of requirements which have been deemed fundamental to our entire institutional development; and the condemnation of administrative holdings which transcend the valid powers conferred is but a means of confining delegated functions and their exercise within the bounds of statutory jurisdiction. Judicial determinations of this character have imposed no unnecessary restraints upon the essential freedom of the Commission. They have but defined its jurisdiction on an authoritative basis, in conformity with orderly legal processes. And like ends have been served by the judicial requirements that findings and orders be supported by evidence and that pertinent rules of law be not ignored or misapplied. Administrative determinations which do not comply with such requirements are vitiated, not because of differences in judgment as between the primary tribunal and the courts, but because they involve abuse of authority or issue in arbitrary action."[77]

Each—administrative tribunal and court—is performing its proper function, and each of the functions is essential to the other. Our principle of separation of powers is not violated, but is applied to obtain both efficiency and protection of individual rights through the necessary and proper coordination of powers.

76. See James M. Landis, Administrative Policies and the Courts, 47 Yale Law Journal, 519 (1938), and Robert N. Cooper, Administrative Justice and the Role of Discretion, *ibid* 577.

77. Sharfman, The Interstate Commerce Commission, Part II, pages 486-87, and see note 198 at page 452.

# *News of the Bar Associations*

## *California State Bar Holds Notable Meeting at Del Monte — President Vallee Urges Vigorous Public Educational Program — Establishment of a Committee on Civil Rights Approved—Other Committee Reports—New Officers Elected etc.*

THE California State Bar held its twelfth annual meeting at Del Monte on Sept. 8 and 9. According to the report in the September issue of the *State Bar Journal*, "the 1939 gathering's stature and quality far exceeded that of any of its eleven predecessors."

President Paul Vallee's address attracted particular interest and commendation. He declared that the State Bar should continue to engage in a vigorous public educational program and adhere to its recently established policy to place before the public any and all information which would tend to create a closer and better relationship.

"It was definitely a convention of much activity," says The *State Bar Journal*. "There were few, if any, dull moments.

"The tremendous task of preparing for the meeting was performed through the concentrated efforts of a committee composed of J. Oscar Goldstein, chairman; Grove J. Fink and Frederick J. Heid, Jr. The untiring work of this committee was largely responsible for the smooth functioning of the convention activities.

"A topic of much favorable comment was the remarkable growth of the Conference of Bar Association Delegates. Since its inception five years ago, this representative body has become a dominating instrumentality for the expression of the thoughts and ideas of attorneys throughout the State. This year at Del Monte the Conference definitely established itself as the policy-forming agency of the convention.

"The entire opening day of the meeting and one-half of the second day were given exclusively to the Conference sessions. During this time the delegates, representing some sixty-two Bar Associations in the State, considered and acted upon forty-three resolutions and thirteen committee reports.

"Under the firm guiding hand of Chairman Rex Hardy, the sessions moved along with efficiency and eclat, the right to unlimited debate being extended to all present, whether delegates or not. Mr. Hardy deserves sincere commendation for the genial, precise and gracious manner in which he piloted the Conference through the intricate maze of resolutions, reports and debate.

GERALD H. HAGAR
President, State Bar of California

"Upon the completion of the Conference business, Chairman Hardy relinquished the reins of leadership to the capable hands of Lawrence Livingston of San Francisco, who was chosen to head the work of the delegates the coming year.

"At its organization meeting, the new Board of Governors elected Gerald Hagar of Oakland as State Bar President, succeeding Paul Vallee of Los Angeles. Other State Bar officers named are: Kenneth McGilvray, Sacramento, vice-president; Frederick J. Heid, Jr., Tulare, vice-president; John Hewicker, San Diego, vice-president; and Philip Angell, San Francisco, treasurer.

"In addition to Chairman Livingston, the Conference selected the following members for its Executive Committee: M. B. Wellington, Santa Ana, first vice-chairman; A. G. Bailey, Woodland, second vice-chairman; Edwin A. Heafey, Oakland; Warren Libby, Los Angeles; L. H. Phillips, Los Angeles; and Vincent Whelan, San Diego.

"The Junior Bar of the State elected James E. Ingebretsen of Los Angeles as its president for the coming year. Ingebretsen is a past president of the Los Angeles Junior Bar and has been active in State Bar activities for several years.

"Other officers named by the Junior Bar are: Ben K. Leber, San Francisco, first vice-president; W. Thomas Davis, Los Angeles, second vice-president; George Tobin, Oakland, third vice-president, and Prentiss Moore, Los Angeles, secretary. New members chosen for the executive committee are: Francis McCarty and James Freeman, San Francisco; Caryl Warner, Los Angeles; Burton Goldstein, Chico, and James B. Colton, San Diego.

"While the convention as a whole debated numerous issues, the subjects that commanded most attention and discussion were the Bar's comprehensive public relations program and the legislative work as carried on by the Committee on Administration of Justice and Committee on Legislation. Approval of the Conference and the General Assembly was given to the work of these committees as outlined in their reports.

"The recommendation of the Committee on Administration of Justice that in the future the Bar limit its legislative program to the more important issues won the approval of the convention.

"A proposal that appellate tribunals review findings of fact as well as questions of law stimulated considerable discussion which culminated in the adoption of a resolution requesting the Board of Governors to appoint a committee to study the desirability of such a change and report at the next Conference. Among those supporting the change was former Supreme Court Justice John W. Preston, who declared that the present rule is unsatisfactory and had worked many injustices.

"Following the example of the American Bar Association, the convention voted in favor of the establishment of a Bill of Rights Committee to aid in the protection of constitutional liberties. The resolution requested the Board of Governors to appoint such a committee and prescribe its powers and duties.

"One of the most enthusiastic receptions given a committee report was that accorded the Juvenile Crime Prevention Committee of the Junior Bar. Harold

H. Krowech, the committee chairman, presented a detailed account of how his group of young attorneys have been visiting public school assembly meetings throughout California and giving the students dramatic warnings against the dangers of criminal acts.

"Krowech pointed out that the American Bar Association has requested complete data on the program in order that it may be extended to all the 48 States. Following Krowech's presentation, the educational program was described by speakers as 'one of the finest things the State Bar has embarked upon.'

"A resolution urging the federal government to do all within its power to maintain American neutrality in connection with the present European war was rejected on the ground that such action was outside the jurisdiction of the State Bar."

The meeting took action on a number of other resolutions and reports before adjournment.

## *Colorado Bar Association Meeting Has Record Attendance—President Blount's Address Outlines Accomplishments of Affiliated Bar System—President Beardsley of American Bar Association Delivers Address—Other Speakers—Business Transacted etc.*

CHARLES A. BEARDSLEY, President of the American Bar Association, delivered the principal address at the forty-second annual meeting of the Colorado Bar Association held at the Broadmoor Hotel in Colorado Springs, on September 22, 23, 1939. More lawyers were registered and in attendance at this meeting than at any other convention of the State Bar Association. It was the first time in the history of the State that every portion of the State had an active district organization and that each district organization was affiliated directly with a State bar organization.

Asserting that war is a challenge to the legal profession, because the administration of justice is a substitute for war by civilized man, Mr. Beardsley, in his address "The Need for Better Justice," Friday evening urged lawyers to exert themselves to the utmost to strengthen the processes for obtaining justice.

"American lawyers and judges," Mr. Beardsley declared, "can make their greatest contribution to the cause of peace, by giving unstinting support to their local and State bar associations, and to their American Bar Association. Quite obviously, this is true, because it is through these associations that the American lawyers and judges can best promote those improvements that will give to the American people the best possible administration of justice, in court and out of court. And it is through these associations that the lawyers and judges can best awaken and keep alive, in the minds of the American people, a wholesome and intelligent respect and regard for their administration of justice—a wholesome and intelligent respect and regard for, and a fixed determination to use, this substitute provided by civilized men for fights and for wars—this substitute provided by civilized men for the method of settling disputes that is now being used on the other side of the Atlantic."

WILLIAM R. KELLY
President, Colorado Bar Association

The Friday morning session of the convention was devoted to committee reports. All members attending the meeting were guests of Wilbur F. Denious, past President of the Association, at a delightful luncheon that noon at the Broadmoor Hotel. Entertainment at the luncheon was provided by the Law Club of Denver, which presented a humorous satire on the conduct of a meeting of a bar association.

Following the luncheon, G. Dexter Blount of Denver, retiring President of the Association delivered the President's address. Mr. Blount outlined the accomplishments of the affiliated bar system, which in the first year of its existence successfully held legal institutes in every part of the State, began the publication of a State Bar Journal, organized the lawyers all over the State into a cohesive unit, defeated unfavorable legislation, substantially increased the State membership in the American Bar Association, undertook to rewrite the Colorado Code along the lines of the Federal rules, and carried on the customary activities of a normal bar association.

The remainder of the afternoon was devoted to a discussion of the work of the committee on Uniform Procedure in State and Federal Courts. This committee has been redrafting the code of civil procedure in Colorado to conform to the Federal rules. Over a hundred lawyers and judges from all over the State have been working on this project for the past nine months, and the present program calls for a rough draft of the proposed revision to be placed in the hands of all attorneys by December first, according to the announcement made at the meeting by the Chairman, Philip S. Van Cise.

The Saturday morning session featured a talk by Jacob M. Lashly of St. Louis, Chairman of the Commercial Law Section of the American Bar Association. Mr. Lashly discussed "The Fourth Co-ordinate Branch of Government," urging that administrative tribunals act solely as a tribunal and not as judge, jury and prosecutor, and that a uniform method of judicial review of all of the decisions of the tribunals be provided. William R. Kelly, new President of the Colorado Association, discussed local bar association institutes, and a report was had from the delegates to the American Bar Association convention.

The luncheon meeting was devoted to the Junior Bar Conference. A. Pratt Kesler, National Vice-chairman of the Conference, and James D. Fellers, councilman for the tenth circuit, spoke briefly. Following these talks the Conference selected Hugh D. Henry of Denver, Chairman, Leo S. Altman of Pueblo, Vice-chairman, and John W. O'Hagan, Secretary.

The afternoon session convened to hear an address of Justice John C. Young of the State Supreme Court on "Is there Need for Integration of the Judiciary?" Paul H. Hannah, National Chairman of the Junior Bar Conference, then outlined the work and plans of the Conference. He stressed the fact that the legal profession is fighting to make democracy safe for America and to maintain the profession of law. After outlining the attacks made on democracy and the legal profession, Mr. Hannah

said that the Junior Bar was enlisted "for the duration," and that it intended to rout the attacks by hard work intelligently directed and carefully executed by a unified bar.

Following a revision of the by-laws to provide greater flexibility and workability, the association selected William E. Hutton of Denver, as President-Elect, Edward L. Wood of Denver, senior Vice-President, Judge John R. Clark, Robert Tarbell, and Jacob S. Schey as Vice-Presidents. Edward C. King was reappointed Treasurer, and Wm. Hedges Robinson, Jr. as Secretary. Mr. William R. Kelly of Denver, President-Elect for the past year, automatically became the new President at the close of the convention.

The final session of the convention was the annual banquet at which George P. Winters acted as toastmaster. Short talks were given by Messrs. Beardsley, Lashly, and Kelly, Ralph L. Carr, Governor of the State of Colorado, and Justices Francis E. Bouck and Ben C. Hilliard of the Supreme Court, following a welcome extended by John A. Carruthers, President of the El Paso County Bar Association. The banquet program closed with entertainment furnished by the Cheyenne Mountain Dancers.

Several delightful social programs were arranged. The ladies present at the convention were entertained on Friday at a tea at the Fine Arts Center as guests of Mr. and Mrs. Carruthers, and on Saturday by a trip to the Will Rogers Shrine and a luncheon at the Cheyenne Lodge as guests of the El Paso County Bar Association. Friday forenoon Mr. Denious was host at a reception for Mr. Beardsley, and Saturday afternoon Mr. and Mrs. Spencer Penrose entertained at a cocktail party at the hotel.

WM. HEDGES ROBINSON, JR.,
*Secretary.*

## *Iowa State Bar Association Holds Forty Fifth Annual Meeting—President Shull Delivers Address on "The Rule-Making Authority in Iowa"—Distinguished Speakers on Program—Committee Reports Show Consistent Activity—New Officers Elected, Etc.*

THE Forty-fifth Annual Meeting of the Iowa State Bar Association was held at Hotel Martin, Sioux City, Iowa, June 14, 15 and 16, 1939. The evening of the 14th was devoted to a program of entertainment sponsored by the Junior Bar Section.

All of the general convention sessions were presided over by President Henry C. Shull of Sioux City. The opening session on the morning of June 15th was featured by the Annual President's Address by Mr. Shull under the title, "The Rule Making Authority in Iowa."

Mr. Shull detailed the history of Iowa legislative enactments having to do with the procedural rules of our Courts and presented an enlightening review of the activities of our association in attempting to secure from the 48th legislature an enactment that would ultimately place the rulemaking power in the Supreme Court of Iowa. As explained by him, this attempt was defeated in the House of Representatives by a narrow margin. He also pointed out that after twenty years of effort the Supreme Court of Iowa finally adopted new rules raising the standards of admission to the Bar.

Mr. Shull concluded his address in the following well chosen words: "The Greek philosopher was right when he said that nothing was permanent except change. So long as we are content merely to defend things as they are, we will never see the glory of the dawn of things as they ought to be. All professions and callings are circumscribed by certain pre-existing metes and bounds. The pre-existing limitation against which all lawyers have to struggle is our tendency to glorify the past. Remember, my friends, the past is always glorious, the present always doubtful and the future belongs to our children. I am confident that the great majority or our profession in Iowa can rise above the consideration of the past in the interests of a better system of procedure for the administration of justice."

Reports of the various committees were made during the opening session. Of particular interest was the report by Frank Senneff of Britt, Iowa, Chairman of the Special Committee on Legal Institutes, in which he reported that twenty-five institutes had been held in Iowa since the district plan of institute was started in Iowa in February of 1938. Splendid reports showing consistent committee activity were presented by the respective chairmen of the Committee on Recodification of Corporation Laws, the Committee on the Unauthorized Practice of Law, the Membership Committee and the Special Committee on Juvenile Delinquency and Parole Administration.

The afternoon session opened with the report of the Chairman of the Legal Biographies Committee. As the names of the sixty-four members of the Iowa bar who died during the past year were read by the Chairman, those present stood in silent tribute. The address of the session was delivered by Dean James M. Landis of the Harvard Law School upon the subject, "An Effort to Articulate Some of the Changing Postulates of Our Legal Order," in which he interestingly traced and developed the never ending changes in the premises of the legal order.

At the Annual Banquet on Thursday evening President Shull served as Toastmaster. Following a program of entertainment and the introduction of distinguished guests, the Hon. F. F. Faville of Sioux City, Iowa, presented a masterful address under the subject of "A Country Lawyer" in which he portrayed Abraham Lincoln as a country lawyer, and reviewed some of the cases that he tried and the work he did as a practicing lawyer in Illinois, with special emphasis on his reverence for law and for the Constitution of the United States. President Shull next introduced Hon. Frank J. Hogan, President of the American Bar Association, who addressed the banquet upon the subject of "The Bar and the Public." President Hogan paid high tribute to the members of the legal profession by stating that the American public is turning to our profession, more than ever before, in order to find men to fill positions of high public trust.

The meeting Friday morning was divided into the following four Group Sections: Improvement of Civil Procedure and Practice in Iowa under the Chairmanship of Chief Justice Richard F. Mitchell of Fort Dodge; Property Law and Probate, of which R. E. Hatter, Marengo, was Chairman; Criminal Law and Procedure, presided over by Attorney General F. D. Everett of Albia; and Junior Bar Section presided over by President Alvin G. Keyes of Cedar Rapids. Each of the Section programs consisted of presented papers upon assigned subjects followed by general discussion. In the Junior Bar Section, the following officers were elected for the next year: Kenneth T. Wilson, Sioux City, President; Richard H. Plock, Burlington, Vice-President; and Edward J. Kelly, Des Moines, Secretary.

The closing luncheon at the Sioux City Country Club was high-lighted by the entertaining and inspiring address of Hon. Jacob M. Lashly, President of the Bar Association of St. Louis, Mis-

souri, upon the subject, "Administrative Law: A Fourth Coordinate Branch." Following the adoption of resolutions, the Association elected as President for 1939-40, Harley H. Stipp of Des Moines, former Vice-President, and long a diligent and enthusiastic worker in Bar affairs. Other officers elected were George C. Murray of Sheldon, Vice-President, and L. L. Brierly of Newton, as Secretary-Treasurer, who will succeed Mason Ladd of Iowa City, recently appointed Dean of the College of Law, University of Iowa.

L. L. BRIERLY,
Secretary-Treasurer.

## *State Bar of New Mexico Holds Annual Meeting at Santa Fe—D. A. Simmons of Texas Speaks on "The Responsibility of the Lawyer in a Democracy"—President Kiker's Address on "The Great Debate"—Bronze Portrait of Late Justice Parker Presented to State —*

THE annual meeting of the State Bar of New Mexico was held at Santa Fe on August 18 and 19, 1939.

The program included an address by Mr. D. A. Simmons of Houston, Texas, on the subject "The Responsibility of the Lawyer in a Democracy," which was received with interest and much favorable comment.

Judge Henry A. Kiker, our President, delivered an address which he designated as "The Great Debate." In it he summarized the conclusions of the two different schools of thought as expressed by former President of the American Bar Association Frank J. Hogan, and by Senator James F. Byrnes, of South Carolina, at the meeting of the American Bar Association at San Francisco in their discussion of recent opinions of the United States Supreme Court on constitutional questions. In the course of his address he seriously questioned the constitutionality of recent national legislation sponsored by Senator Hatch prohibiting Federal officials and employees from activity in partisan politics.

Chief Justice Howard L. Bickley of the Supreme Court delivered an address on the subject "Observations Concerning Justice." The Chief Justice, at another time during the meeting, reminded us that on that very day and hour in this City 93 years ago General Stephen Watts Kearney entered the plaza of Santa Fe and annexed as territory of the United States the greatest southwest region, including what is now New Mexico, without drawing a sword or shedding a single drop of blood.

Addresses were delivered by W. C. Whatley, subject: "Juror Selections"; Pearce C. Rodney, subject: "Uniformity for Federal and State Procedure"; George L. Reese, Jr., subject: "The Laws of New Mexico with Reference to the Taxation of Minerals"; A. M. Fernandez, subject: "The Pendulum in Tax Legislation"; Ross L. Malone, Jr., subject: "The Bar and the Bill of Rights"; and A. T. Hannett, subject: "Waters of New Mexico.

EDWIN MECHEM
President, State Bar of New Mexico

It was the general comment of those in attendance that all of the addresses were especially well prepared and that, upon being printed in the annual report, they will be valuable for reference purposes on the subjects treated for the active practitioner in the State.

Resolutions adopted included recommendations to the Supreme Court that rules be by it promulgated as follows: (1) that posting of notices at the court house door and publication in the Spanish language in probate proceedings be abolished, and (2) that only duly licensed attorneys be authorized to practice in the probate courts. A committee was appointed to prepare and submit briefs pro and con to the Supreme Court with reference to its power to regulate probate practice and its power to punish for contempt should these rules be adopted.

A resolution was also passed recommending to the Board of Commissioners that a Committee on Civil Liberties be appointed.

A lively discussion took place relating to the desirability of adopting substantially the new Federal rules of practice for the State courts. Mr. Quincy D. Adams, who is Chairman of the Advisory Committee of the Supreme Court on Rules, reported that recommendations had heretofore been submitted by the committee proposing the adoption of some of these rules, such as the one relating to the taking of depositions and another which provides for demanding jury trial at the beginning of a case. He stated that the committee favored adopting from time to time such of the Federal rules as might be an improvement of our own and that, generally speaking, he believed all of them to be worthy of consideration.

During the sessions an impressive dedication ceremony was held incident to the presentation of a bronze portrait in relief of the late Frank W. Parker by members of the bar to the State of New Mexico. District Judge David Chavez, Jr., presided at the ceremony. Judge Parker was an outstanding and beloved Justice of the Supreme Court of New Mexico for the period of thirty-four years, from 1898 to 1932 when he died. The portrait was placed in the foyer adjacent to the library in the Supreme Court Building. Mr. Percy Wilson, a distinguished member of the bar, of Silver City, and an old friend and associate of Judge Parker, delivered the address of presentation. Mr. J. O. Seth, Chairman of the Supreme Court Building Commission of Santa Fe, accepted the same on behalf of the State.

The following officers were elected for the ensuing year: President, Edwin Mechem, Las Cruces; First Vice-President, George L. Reese, Sr., Roswell; Second Vice-President, Everett M. Grantham, Clovis; Secretary-Treasurer, Herbert Gerhart, Santa Fe.

The annual banquet and ball were held at La Fonda with more than two hundred attending. William J. Barker, of Santa Fe was toastmaster at the banquet. Judge J. D. Lydick of Oklahoma City, was kind enough to favor us with an entertaining address on the occasion. The local bar entertained the ladies at a luncheon and all members and their ladies at a cocktail party at Santa Fe Inn on Saturday evening.

Judge David Chavez, Jr., served in his usual efficient and cordial manner as chairman of the local committee on entertainment and arrangements. The meetings were well attended. There was general interest displayed and the annual meeting was a most successful one.

HERBERT GERHART, *Secretary.*

## *Oregon State Bar Annual Meeting Program Provides Judicious Mixture of Business and Pleasure—Important Committee Reports Acted On—Three Legal Institutes Held—Distinguished Speakers Heard—New Officers Elected, Etc.*

THE Oregon State Bar held its Fifth Annual Meeting at the Hotel Gearhart, in Gearhart, Oregon, on September 28th, 29th and 30th. Registration showed an attendance of about 300 members, but no doubt there were additional members present who failed to register. It is interesting to note that some members traveled distances of over 400 miles to attend the meeting and the registration list reflects the attendance of three members from Yakima, Washington; Spokane, Washington and San Francisco, California, respectively.

It was the aim of this year's program committee to provide a program which would be a judicious mixture of business and fun, and the schedule was so arranged that adjournment could be reached at approximately 2:30 each afternoon to allow all who desired to participate in a golf tournament or other social diversion. To make this possible, and because practically all of the committee reports had been printed in pamphlet form and distributed to all members of the bar a month prior to the meeting, all except a few of the most important and controversial reports were presented at three contemporaneous panels on Thursday evening. Under rules adopted by the meeting, no parliamentary action was permitted at these panels but any motions to amend, adopt or reject were required to be submitted and debated at that time.

Thereafter on Friday afternoon the panel reports came before the entire assembly for parliamentary action upon the motions made at the time of submission of the reports to the panels and such other motions as in the discretion of the presiding officer were considered proper, but without further debate. This procedure, which was in the nature of an experiment, proved to be very successful and contributed materially to the streamlined program.

The more important committee reports, principally those of the committees on Judicial Administration, Procedure and Practice, Selection of Judges, Bar Organization, and Banks and Trust Companies, were presented to the entire assembly at various times throughout the program for debate and action.

The Committee on Judicial Administration presented a detailed and comprehensive report recommending the passage of legislation granting to the Supreme Court the power to promulgate rules of pleading, practice and procedure for judicial proceedings in all courts of Oregon, and that any such act provide for the creation of a standing advisory committee consisting of lawyers, legal educators, judges and laymen whose duty it shall be to observe and study the administration of justice in the courts of Oregon and to advise the Supreme Court from time to time as to changes in rules of pleading, procedure and practice which will in its judgment simplify procedure and promote the speedy determination of litigation upon its merits. The committee also recommended that a bill be prepared to effectuate the objects set forth and submit the same at the next annual convention. The report of the com-

H. H. DeARMOND
President, Oregon State Bar

mittee was approved and a resolution embodying the recommendation of the committee was adopted.

The Committee on Procedure and Practice directed its attention to the advisability of adopting rules to govern State practice similar to the new Federal rules of procedure, and recommended that it be authorized to prepare a draft of rules of civil procedure, to publish and distribute to the members of the bar copies thereof, and to canvass the bar to determine what if any changes are desirable in such draft and whether the bar generally favors the adoption of such rules and to render a complete and detailed report for consideration at the 1940 convention. The report was approved and adopted.

The Committee on Selection of Judges confined itself to general principles and recommended among other things that judges of the Supreme Court and the inferior courts of Oregon should be appointed to office. The report was approved.

The Committee on Bar Organization presented a report in which was considered the advisability of the creation of a House of Delegates, with the idea of enlarging participation by the average attorney in the affairs and operations of the Oregon State Bar. This report was referred back to the Board of Governors for further study.

In furtherance of the educational aims of the State Bar, three contemporaneous legal institutes were arranged for Friday evening. One of these was on the subject of, "Pitfalls of Taxation," and the institute considered income tax problems arising in the formation and liquidation of corporations, phases of tax problems arising in general practice, pitfalls in estate and gift taxes—federal and estate—and recent changes in the Oregon income tax laws. The second institute was on the subject of, "The Relative Merits of Title Insurance and Abstracts," and the third institute was on the subject of, "Law Office Management." These institutes were well attended and were received with very great interest by practically all members in attendance at the convention.

The guest speakers included Hon. Charles A. Sprague, Governor of Oregon, who addressed the assembly at the conclusion of the dinner on Thursday night, and Hon. Thurman Arnold, Assistant Attorney General of the United States, who spoke at the assembly session Friday morning expounding his theories and those of the Department of Justice relative to antitrust activities. Mr. Arnold's address was followed by an open forum participated in by many members wherein questions were asked of Mr. Arnold. At the Saturday morning session Hon. Bert Haney, judge of the United States Circuit Court of Appeals for the Ninth Circuit and a member of the Oregon State Bar, addressed the assembly, taking as his topic the history and personnel of the court of which he is judge. Mr. H. B. Clark, managing editor of Bancroft-Whitney Company, publishers of the new 1940 Oregon Code, spoke at a luncheon meeting relative to the plans of the company in preparing and editing the new Code. This was naturally a topic of great interest to the members, and at the conclusion of his remarks Mr. Clark remained to answer questions.

At the Saturday afternoon session the retiring president, Mr. R. R. Bullivant, delivered his annual address in which he outlined the work ahead for the State Bar and warned the members of the many pitfalls which might lie in wait for the organization in the event factional differences and failure of cooperation should appear. At the conclusion of his address he introduced Mr. H. H. De Armond, newly elected president of the Oregon State Bar.

Mr. George M. Roberts of Medford, the newly elected vice-president, and a member of the Board of Governors since 1938, Mr. Arthur H. Lewis, re-elected treasurer, and Mr. F. M. Sercombe, re-elected secretary, were also introduced, after which the meeting adjourned.

F. M. SERCOMBE,
Secretary.

## *South Dakota State Bar Holds Ninth Annual Meeting—Interesting Addresses Delivered—Legal Institute on Pre-trial Procedure and Appellate Procedure Held on Evening of First Day — Addresses — New Officers Elected*

THE ninth annual meeting of the State Bar of South Dakota was held at Mitchell on August 24 and 25, 1939. An unusually large number were in attendance. The Circuit Judge Association held its annual meeting on the day previous, as did the States Attorney Association.

On the first day addresses were given by President Roy E. Willy of Sioux Falls and by Hon. Charles A. Beardsley, President of the American Bar Association, who spoke on "The Need for Better Justice." On the evening of the first day a legal institute on Pre-trial Procedure, and also on Appellate Procedure was conducted by Hon. Van Buren Perry and Hon. Dwight Campbell.

On the morning of the second day an address was given by Hon. Harlan J. Bushfield, his subject being "Americanism." Governor Bushfield is an active member of the State Bar, having served three years on the Board of Bar Commissioners. On the afternoon of the second day Robert F. Maguire, Esq., of Portland, Oregon, spoke on "Adminis-

LEWIS BENSON
President, The State Bar of South Dakota

trative Law, an Old Wine in a New Bottle."

The annual dinner was held on the evening of the second day at which time Hon. David Horton Elton, K. C., Mayor of Lethbridge, Alberta, Canada, spoke on "The Good Neighbor."

The following officers were elected for the ensuing year: President, Lewis Benson, Huron; Vice President, C. L. Morgan, Mitchell; Treasurer, L. M. Simons, Belle Fourche; Secretary, Karl Goldsmith, Pierre.

Commissioners: Helmuth D. Giedd, Avon; Roy D. Burns, Sioux Falls; W. A. Gronna, Clear Lake; M. A. Brown, Chamberlain; B. A. Walton, Aberdeen; R. F. Drewry, Pierre; C. A. Wilson, Hot Springs; Alex Rentto, Deadwood; Max Royhl, Huron; Harry E. Mundt, Mound City; C. F. Manson, White River; A. E. Yager, Lemmon; T. M. Bailey, Sioux Falls; Byron S. Payne, Pierre; and William H. Warren, DeSmet.

The State Bar was very happy to entertain as its guests, other than the speakers, Mr. James M. Lannigan, President of the Nebraska State Bar Association, Mr. George H. Turner, Clerk of the Supreme Court and Secretary of the Nebraska State Bar Association, Hon. Harvey M. Johnsen, Justice of the Supreme Court of Nebraska, and Mr. Aloys M. Wartner, the immediate past President of the North Dakota Bar Association.

KARL GOLDSMITH,
*Secretary.*

## *Vermont Bar Association Adopts New Canons of Professional Ethics Recommended by American Bar Association—President Leamy Devotes Address to Professional Ethics—Burt J. Thompson Speaks on "Legal Institutes"—New Officers*

THE sixty-second annual meeting of the Vermont Bar Association was held in Montpelier, October 3rd and 4th, 1939.

A good attendance was on hand especially at the annual dinner when about 200 enjoyed an address by Hon. William H. Wills, Lieutenant-Governor of Vermont, and an address by Professor Waldo H. Heinrichs of Middlebury College, who gave a vivid account of an extended tour during the past summer through Europe. The address of the President James P. Leamy of Rutland was devoted to Professional Ethics and called attention to several instances of unprofessional conduct occurring in the State recently.

The Secretary's report showed a membership of 331 members and 19 new members were elected at this meeting. A Memorial address on Hon. John Garibaldi Sargent was delivered by Paul A. Chase; one on J. Rolf Searles by Judge Harland B. Howe and one on Robert Roberts by Guy B. Horton.

An instructive and inspiring talk on "Legal Institutes for every Local Lawyer" was delivered by Burt J. Thompson of Iowa, Chairman of the American Bar Association Committee on Advanced Legal Education. It is expected that this will result in Legal Institutes being held in Vermont soon.

Walter S. Fenton of Rutland, State Delegate to the American Bar Association, gave an interesting account of the Annual Meeting in San Francisco and introduced a resolution recommending the passage by Congress of the pending Logan bill on administrative procedure, which resolution was unanimously adopted.

The fiftieth anniversary of John Redmond's (of Newport) admission to the Bar was recognized by addresses by Judge Charles H. Darling and Judge Harland B. Howe.

A reception and tea for the visiting ladies was given at the Guest House of the National Life Insurance Company under the auspices of a local committee headed by Mrs. Fred E. Gleason of Montpelier.

NEIL D. CLAWSON
President, Vermont Bar Association

Three new canons of Professional Ethics recommended by the American Bar Association were adopted. The usual committee reports were made.

The following officers were elected: President, Neil D. Clawson, Brattleboro; Vice Presidents, Horace H. Powers, St. Albans; Joseph A. McNamara, Burlington; Leonard F. Wing, Rutland.

Member of Board of Managers, Deane C. Davis, Barre; Treasurer, Webster E. Miller, Montpelier; Secretary, Harrison J. Conant, Montpelier.

H. J. CONANT,
*Secretary.*

## *Virginia State Bar Holds First Annual Meeting—President Reports Progress Since Bar's Formal Organization Last Year—Work of District Committees in Investigating Complaints of Unprofessional Conduct and Unlawful Practice—Simplification of Procedure in Virginia to Be Studied etc.*

THE Virginia State Bar held its first annual meeting at the John Marshall Hotel in Richmond, Virginia, at 2:00 P. M. on Wednesday, Aug. 2, 1939. The meeting was a short one, and there was not a great deal of business transacted by the Bar, as under the present set-up of the Virginia State Bar, the Council, which is elected by the members of the Bar in the Judicial Circuits, and six members-at-large, appointed by the Supreme Court of Appeals, transact most of the business.

The meeting was attended by between 250 and 300 members. The annual meeting of the Bar followed a meeting of the Council that was held at 10:00 A. M. on the morning of Aug. 2. The meeting was presided over by Samuel H. Williams, first President of the Virginia State Bar. Invocation was offered by Dr. Solon B. Cousins, Professor of Bible at the University of Richmond, an address of welcome was extended by Robt. G. Butcher, President of the Richmond Bar Association.

The first order of business was the report of the President, advising of the

progress the Bar had made since its formal organization on Dec. 13, 1938. The President's report was followed by report of the Secretary-Treasurer, which showed approximately 2,700 members of the Virginia State Bar, and that the finances of the Bar were in good shape. Vice-President John S. Battle made a report for the Council.

Reports were made by the Chairmen of the three Standing Committees: Judicial Ethics, Gardiner L. Boothe, Chairman; Legal Ethics, Channing M. Hall, Chairman; Unauthorized Practice of Law, Chas. E. Pollard, Chairman.

SAMUEL H. WILLIAMS
President, Virginia State Bar

Reports were then heard from the Chairmen of the several District Committees as to the work of the Committees in investigating complaints of unprofessional conduct on the part of attorneys, and unauthorized practice of law by laymen. These reports were most interesting and enlightening, and indicated that the District Committees had taken their work seriously, and had tackled a tough job in a most conscientious and impartial manner.

Reports of Special Committees were then heard: Audit of Treasurer's account, Andrew J. Ellis, Chairman; Publication of Opinions, R. O. Norris, Chairman; By-Laws, Frank W. Rogers, Chairman.

A Committee on Resolutions was appointed, and a draft of By-Laws for the governing of the Bar was submitted to the Bar and adopted, and referred to the Supreme Court of Appeals of Virginia, with the recommendation that it approve them.

Under New Business, a resolution was adopted, appointing a committee to study the simplification of procedure in Virginia. This committee was instructed to confer with other committees from other legal organizations.

The following officers were elected for the year beginning Sept. 1, 1939: Samuel H. Williams, of the Lynchburg Bar, and representing the 6th Judicial Circuit, President; John S. Battle, of the Charlottsville Bar, and member-at-large of the Council, Vice-President.

At another meeting of the Council, which followed the annual meeting of the Bar, Russell E. Booker, of Richmond, Virginia, was elected Secretary-Treasurer.

R. E. BOOKER,
*Secretary.*



A new designation of coordinators for its enforcement districts has been made by the Treasury Department. This work of coordinating heretofore has been done by Coast Guard Commanders but the increase of their duties and responsibilities under the President's neutrality proclamations has made the new arrangement desirable. However, in the two insular possession districts the work of coordinating the Treasury's enforcement work remains in the hands of Coast Guard Commanders. In the fifteen continental enforcement districts Treasury agents have been assigned to the coordinating